131-66

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 229.

WILLIAM P. ABENDROTH, PLAINTIFF IN ERROR,

vs.

ABRAHAM VAN DOLSEN AND WILLIAM H. ARNOTT.

IN ERROR TO THE CITY COURT OF NEW YORK.

FILED MARCH 11, 1886.

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1 UNITED STATES OF AMERICA.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, John Reid, clerk of the city court of New York, by virtue of the annexed writ of error, do hereby certify that the following pages contain a true and complete transcript of the records and proceedings had in said court in the case of Abraham Van Dolsen & William H. Arnott against William P. Abendroth, impleaded, &c., as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, this 20th day of February, A. D. 1886.

[Seal City Court of New York.]

JOHN REID,
Clerk City Court, N. Y.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the city court of New York, in the city of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said city court, before you or some of you, in the sum of $2,022.27, said judgment having been affirmed by the court of common pleas in and for the city and county of New York at a general term thereof, being the highest court in the State of New York in which a decision could be had in said suit of Abraham Van Dolsen and William H. Arnott, plaintiffs, against William P. Abendroth, impleaded, defendant, and the record having been remitted from said court of common pleas to your court, where was drawn in question the validity of a statute of the United States and the decision was against such validity, and where was drawn in question the validity of an authority exercised under the United States and the decision was against its validity, and wherein the right, privilege, and immunity of said William P. Abendroth was claimed under the statute of the United States and under authority exercised under the United States and the decision was against said right, privilege, and immunity specially set up and claimed under such statute or authority, a manifest error hath happened, to the great damage of the said William P. Abendroth,

3 as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being in-

spected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 12th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed February 9, 1886.

M. R. WAITE,
Chief Justice U. S.

4 [Endorsed:] Supreme Court of the United States. William P. Abendroth, plaintiff in error, *vs.* Abraham Van Dolsen, William H. Arnott, defendants in error. Writ of error. Arnoux, Ritch & Woodford, attorneys for plaintiff in error, 18 Wall street, New York city. Service of copy — within hereby admitted. N. Y., Feb'y 12, '86. Norwood & Coggeshall, def'ts' att'ys.

5 To the Supreme Court of the United States and the Chief Justice and associated justices thereof:

The petition of William P. Abendroth, plaintiff in error, respectfully shows—

That on or about the 23rd day of December, 1870, John Griffith, George W. Wundram, and your petitioner formed a special partnership, under the laws of the State of New York in such case made and provided, under the name of Griffith & Wundram.

That subsequently and on or about the 23rd day of November, 1872, proceedings were duly instituted in the district court of the United States for the southern district of New York, in bankruptcy, wherein the said firm of Griffith & Wundram was duly adjudged and declared to be bankrupts.

That Abraham Van Dolsen and William H. Arnott, doing business as builders in the city of New York under the firm name of Van Dolsen & Arnott, were creditors of John Griffith and George W. Wundram for goods sold and delivered and work, labor, and services rendered on the said 23rd day of November, 1872, and on that day held the promissory note of said Griffith & Wundram for $900 on account thereof.

That said firm of Van Dolsen & Arnott were made parties to said proceedings in bankruptcy and were duly served with notice
6 by the United States marshal as messenger of the bankruptcy court.

That such proceedings were thereupon had in said court, in bankruptcy, to which said Van Dolsen & Arnott were parties, that it was duly adjudged and determined that said John Griffith and George W. Wundram, the bankrupts in said bankruptcy, were the general partners in the limited partnership of Griffith & Wundram, and that William P. Abendroth, your petitioner, was the special partner.

That your petitioner was subsequently duly made the assignee in bankruptcy of said firm of Griffith & Wundram, and thereafter duly qualified as such and entered upon the discharge of the duties of his said office as such assignee.

That said proceedings in bankruptcy are still pending and the adjudication that said firm of Griffith & Wundram was a limited partnership and your petitioner a special partner still remains in full force and effect.

That on or about the 18th day of June, 1877, the said Van Dolsen and Arnott, without having obtained leave therefor from the said United States district court, commenced an action in the city court of New York against the said John Griffith, George W. Wundram, and your petitioner, William P. Abendroth, as defendants, alleging as follows:

"That at the times hereinafter mentioned the defendants were copartners in business, carrying on said business in the city of New York under the firm name and style of Griffith & Wundram; that on or about the seventh day of August, 1872, at the city of New York, the said defendants, in and under their said firm name of
7 Griffith & Wundram, made their certain promissory note in writing, bearing date on that day, whereby they promised, three months after the date thereof, to pay to the order of Van Dolsen & Arnott, these plaintiffs, the sum of nine hundred $\frac{33}{100}$ dollars, and thereupon delivered said note to these plaintiffs."

That your petitioner thereafter appeared in said action and interposed an answer to said complaint, in which answer your petitioner denied that the said defendants were copartners, as alleged in said complaint; and your petitioner, for a further defence, interposed the action of and proceedings in the said district court of the United States for the southern district of New York, in bankruptcy, in the matter of John Griffith and George W. Wundrum, composing the firm of Griffith & Wundram, both in bar and in abatement of said action, as by reference to said answer will more fully and at large appear.

That the said cause under said answer came on for trial, and such proceedings were therein had that the court directed judgment for the said plaintiff in said action, the trial judge holding that the bankruptcy proceedings had no relevancy to the questions introduced in said litigation; to which ruling your petitioner duly excepted, and judgment was, on or about the 7th day of June, 1882, entered in said action in favor of said plaintiffs and against said defendants, including your petitioner, under said direction, for the sum of two thousand and twenty-three $\frac{37}{100}$ dollars.

8 That thereafter your petitioner duly appealed to the general term of said court from said judgment, and such proceedings were thereon had that on or about the 30th day of November, 1885, the said court, at the general term thereof, affirmed the said judgment so appealed from by your petitioner in all things, with costs; that thereafter your petitioner duly appealed to the general term of the court of common pleas in and for the city and county of New York from the said judgment of affirmance, and

such proceedings were thereon had that the said court of common pleas, at a general term thereof, affirmed the said judgment so appealed from by your petitioner in all things, with costs.

That the appellate courts above referred to are and were the proper and only appellate courts having jurisdiction of the several appeals above set forth.

That under and by virtue of the laws of the State of New York no right of appeal to the court of appeals exists in cases arising in the city court, but the appellant may apply to the general term of the said court of common pleas for leave to appeal to the court of appeals, and your petitioner, after the decision and judgment last aforesaid, duly applied for leave to appeal to said court of appeals and the said application was denied.

That the remittitur in said case from the said court of common pleas has been filed in the said city court of the city of New
9 York and the same is now a final judgment in the said action in the highest court of the State of New York in which a decision in the suit could be had, and that in said action was and is drawn in question the validity of the authority exercised under the United States and the decision is against its validity, and wherein the right, privilege, and immunity of your petitioner is claimed under the statutes of the United States and under authority exercised under the United States and the decision of the said State courts is and was against said right, privilege, and immunity so specially set up and claimed by your petitioner, and therein was and is drawn in question the validity of an authority exercised under the State of New York on the ground of its being repugnant to the Constitution and laws of the United States and the decision was and is in favor of its validity; and your petitioner further represents that he is injured by said judgment, and the same is erroneous and without law.

Wherefore your petitioner prays that he may be allowed a writ of error, directed to said city court of the city of New York, directing it to send the record of said judgment to this court, and a citation to said Van Dolsen & Arnott or to Norwood & Coggeshall, their attorneys, requiring them to appear at the next term of this court and show cause why the said judgment should not be corrected; and your petitioner makes the printed case on appeal to the court of common pleas in and for the city and county of New York a part of this his petition.

And your petitioner will ever pray, &c.

Dated N. Y., February 8, 1886.

WILLIAM P. ABENDROTH.

10 STATE OF NEW YORK, }
City and County of New York, } ss:

William P. Abendroth, being duly sworn, says that he is the petitioner herein; that the foregoing petition subscribed by him is true to his own knowledge, except as to any matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM P. ABENDROTH.

Subscribed and sworn to before me this 8th day of February, 1886.
[Seal William C. Wallace, Notary Public, Kings County, N. Y.]
WILLIAM C. WALLACE,
Notary Public, Kings Co.

Cert'f. filed in N. Y. Co.

11 [Endorsed:] Supreme Court of the United States. William P. Abendroth, plaintiff in error, *vs.* Abraham Van Dolsen, William H. Arnott, defendants in error. Petition for writ of error. Arnoux, Ritch & Woodford, attorneys for plaintiff in error, 18 Wall street, N. Y. Service of within is hereby admitted. N. Y., Febr'y 12, '86. Norwood & Coggeshall, def'ts' att'ys.

12 STATE OF NEW YORK, } ss:
City and County of New York, }

Court of Common Pleas for the City and County of New York.

Pleas in the court of common pleas for the city and county of New York, held at the court-house, in the city of New York, on the 6 day of January, in the year of our Lord one thousand eight hundred and eighty-six, before the judges of said court.

Witness Hon. R. L. Larremore, judge presiding, and Hon. Judges H. W. Allen, H. W. Bookstarer.
Remittitur January 8, 1886.
Order, &c.

13 ABRAHAM VAN DOLSEN *et al.*
against
WILLIAM P. ABENDROTH, Imp.

Be it remembered that on the 10th day of December, in the year of our Lord one thousand eight hundred and eighty-five, William P. Abendroth, the appellant in this action, came here into the court of common pleas for the city and county of New York, by Arnoux, Ritch & Woodford, attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the city court of the city of New York, and Abraham Van Dolsen *et al.*, the respondents in said action, afterwards appeared in said court of common pleas, by Norwood & Coggeshall, their attorneys; which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

14 Whereupon the said court of common pleas, having heard this cause argued by Mr. Wm. H. Arnoux, of counsel for the appellant, and Mr. Carlisle Norwood, Jr., of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the city court of the city of New York be affirmed, with costs to respondent.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said city court, there to be proceeded upon according to law.

15 Therefore it is considered that the said judgment is affirmed, with costs to respondent.

And hereupon as well as the notice of appeal and return thereto aforesaid as the judgment of the court of common pleas aforesaid, by them given in the premises, are by the said court of common pleas remitted into the city court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said city court, before the justices thereof, &c.

NATH'L JARVIS, JR.,
Clerk of the Court of Common Pleas,
City and County of New York.

COURT OF COMMON PLEAS,
CLERK'S OFFICE, NEW YORK, *January* 8, 1886.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of common pleas, with the papers originally filed therein attached thereto.

[Seal Court of Common Pleas of New York.]

NATH'L JARVIS, JR., *Clerk.*

16 At a general term of the court of common pleas for the city and county of New York, held at the county court-house, in the city of New York, on the sixth day of January, 1886.

Present: Hon. Richard L. Larremore, P. J.; Hon. Henry Wilder Allen, Hon. Henry W. Bookstarer, JJ.

ABRAHAM VAN DOLSEN & WILLIAM H. ARNOTT, Pl'ffs & Resp'd'ts,
vs.
WILLIAM P. ABENDROTH, Impl'd, Def't & Appel't.

The above-named defendant, William P. Abendroth, having appealed to the general term of this court from the judgment entered in this action in the city court of New York on the thirtieth day of November, 1885, affirming the judgment theretofore entered in this action on the twelfth day of January, 1883, in favor of said
17 plaintiffs and against said defendant, for the sum of two thousand and twenty-three $\frac{77}{100}$ dollars, and the same duly coming on to be heard on the sixth day of January, 1885, and after hearing William H. Arnoux, Esq., of counsel for defendant and appellant, and Carlisle Norwood, Jr., Esq., of counsel for plaintiffs and respondents, in opposition thereto, it is, on motion of Norwood & Coggeshall, attorneys for plaintiffs and respondents, ordered that the judgment so appealed from be, and the same hereby is, in all things affirmed, with costs to plaintiffs and respondents.

Enter.

H. W. BOOKSTARER, *J. C. P.*

A copy.

[Seal Court of Common Pleas of New York.]

NATH'L JARVIS, JR., *Clerk.*

18 GENTLEMEN: Please to take notice that an order, of which the within is a copy, was this day duly made and entered in the office of the clerk of the superior court of the city of New York, at his office, in the county court-house, in the city of New York, N. Y., January 7th, 1886.

Yours, &c., NORWOOD & COGGESHALL,
Att'ys for Pl'ffs.

To Arnoux, Ritch & Woodford, att'ys for def't.

[Endorsed:] N. Y. common pleas. Abraham Van Dolsen *et al.* against Wm. P. Abendroth, impl'd. Order affirming judgment. Norwood & Coggeshall, attorneys for pl'ffs, Morse Building, 140 Nassau street, New York. Carlisle Norwood, Jr., Edwin W. Coggeshall. Due & timely service of an order, of which the within is a copy, & notice of entry thereon is hereby admitted this 7 day of January, 1886. Arnoux, Ritch & Woodford, att'ys for def't.

19 *Appeal Book.*

City Court of New York.

ABRAHAM VAN DOLSEN and ANO., Respondents,
against
WILLIAM P. ABENDROTH, Impleaded, etc., Appellant.

Arnoux, Ritch & Woodford, attorneys for appellant; Norwood & Coggeshall, attorneys for respondent.

20&21 (Here followed index to appeal book, omitted in printing. See general index.)

22 *Amended Summons for a Money Demand on Contract.*

Marine Court of the City of New York.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Plaintiffs,
against
WILLIAM P. ABENDROTH, JOHN GRIFFITH, and GEORGE W. WUNDRAM, Defendants.

To the defendants:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscribers at their office, No. 32 Park Place, in the city of New York, within six days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid the plaintiffs in this action will take judgment against you for the sum of nine hundred $\frac{33}{100}$ dollars, with interest from the 10th

day of November, one thousand eight hundred and seventy-two, besides the costs in this action.

Dated New York, June 18th, 1877.

NORWOOD & COGGESHALL,
Plaintiffs' Attorneys.

23 Marine Court.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT
against
WILLIAM P. ABENDROTH, JOHN GRIFFITH, and GEORGE W. WUNDRAM.

The plaintiffs in this their amended complaint allege—

That at the times hereinafter mentioned the plaintiffs were co-partners in business and carrying on such business in the city of New York under the firm name and style of Van Dolsen & Arnott.

That at the times hereinafter mentioned the defendants were co-partners in business, carrying on such business in the city of New York under the firm name and style of Griffith & Wundram.

That on or about the 7th day of August, 1872, at the city of New York, the said defendants, in and under their said firm name of Griffith & Wundram, made their certain promissory note in writing, bearing date on that day, whereby they promised, three months after the date thereof, to pay to the order of Van Dolsen & Arnott, these plaintiffs, the sum of nine hundred $\frac{32}{100}$ dollars, and thereupon delivered said note to these plaintiffs.

That plaintiffs are the holders and owners of said note, and the said note is wholly unpaid.

Wherefore plaintiffs demand judgment against the defendants for the sum of nine hundred $\frac{32}{100}$ dollars, with interest from the 10th day of November, 1872, and for the costs of this action.

NORWOOD & COGGESHALL,
Attorneys for Plaintiffs.

24 CITY AND COUNTY OF NEW YORK, *ss:*

Abraham Van Dolsen, being duly sworn, says that he is one of the plaintiffs making the foregoing complaint; that the said complaint is true to deponent's own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

AB'M VAN DOLSEN.

Sworn to before me this 18th day of June, 1877.

LEWIS M. NORWOOD,
Notary Public (48), *N. Y. Co.*

The Answer of William P. Abendroth, Appearing by Arnoux, Ritch & Woodford, His Attorneys, to the Amended Complaint of the Plaintiffs in the Above-Entitled Action.

Marine Court of the City of New York.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Plaintiffs,
against
WILLIAM P. ABENDROTH, Impleaded with Others, Defendants.

First. This defendant denies that during the time mentioned in the complaint or at any other time the defendants were copartners, as alleged in the complaint, and he denies that he was in any way or manner a partner in the firm of Griffith & Wundram, except as hereinafter mentioned.

25 Second. He admits the making and delivery of the note set forth in the complaint.

Second.

For a second defense:

During all the times mentioned in the complaint and until the month of November, 1872, the defendants in this action were copartners in a limited partnership formed under and by the firm name of Griffith & Wundram and transacting business as such firm and in such name, in the city and county of New York, under and pursuant to the provisions of article first, title first, chapter four, of part second, of the Revised Statutes, entitled of limited partnership, and the several acts amending the same; that in such partnership the said John Griffith and George W. Wundram, residing in the city of New York, were the general partners and this defendant, the said William P. Abendroth, residing in the town of Rye, in Westchester county, was the special partner; that such partnership was formed by instruments in writing made and executed, in pursuance of such statute, on or about the 23d day of December, 1880, and intended to take effect on the 1st day of January, 1871; that such partnership was intended to commence and did commence on the 1st day of January, 1871, and was to continue for the term of five years from said last-mentioned date, and was formed for the purpose of transacting business in the city and county of New York.

The certificate required by the provisions of the said article of the Revised Statutes and containing all of the particulars required by law to be inserted therein was duly executed and acknowledged by all of said partners, and the affidavit of both the general partners of the amount of capital paid into said firm by the said special partner and containing all the particulars required by law to be in-

26 serted therein were filed and recorded on the said 23d day of December, 1870, in the office of the clerk of the city and county of New York, and the terms of said partnership were thereon published for six weeks immediately after the registry thereof in two newspapers designated by the clerk of said county and published in said city.

The statements contained in said certificates and affidavit were in all respects true, and in the formation of the said partnership, in the filing and recording of said certificate and affidavit, and in such publication and in all other respects the persons forming such partnership fully complied with all the provisions of said article of the Revised Statutes relating to the formation of limited partnerships, and with the several acts amending the same, as this defendant verily believes.

Third.

And for a further and third defence:

First. On or about the twenty-third day of November, 1872, voluntary and involuntary proceedings were duly instituted in the district court of the United States for the southern district of New York, in bankruptcy, wherein the said firm of Griffith & Wundram was duly adjudged and declared to be bankrupts, as by said proceedings, reference being had thereto, will more fully and at large appear.

Second. The claim of the plaintiffs arose upon a money demand on contract, and was provable in said proceedings in bankruptcy under and by virtue of the provisions of the act of Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and of the act supplementary thereto or amendatory thereof. Plaintiffs were then the lawful owners and holders of said claim and were duly made parties to said proceedings in bankruptcy.

27 Third. Such proceedings were thereupon had, to which the plaintiffs were parties, that it was duly adjudged and determined that John Griffith and George W. Wundram, the bankrupts in this bankruptcy, were the general partners in the limited partnership of Griffith & Wundram, of which William P. Abendroth, this defendant, was the special partner.

Fourth. In the course of said proceedings in bankruptcy a meeting of the creditors of said special partnership of Griffith & Wundram was duly held; at said meeting this defendant was duly chosen the assignee in bankruptcy of said firm, and thereafter he duly qualified as such, and entered upon and discharged the duties of his said office.

Fifth. The said adjudication, that Griffith and Wundram were general partners and this defendant was special partner, was made more than one year before the commencement of this action, and the same now remains in full force and effect.

Sixth. This defendant pleads the said proceeding in bankruptcy and each and every part thereof and the adjudication and determinations therein and the acts of the plaintiffs in bar and in abatement of this action.

Wherefore this defendant demands judgment that the complaint be dismissed as against him with costs.

WILLIAM P. ABENDROTH.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

William P. Abendroth, being duly sworn, says that he is the defendant above named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own
28 knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

W. P. ABENDROTH.

Sworn to before me this 6th day of July, 1877.

JOSHUA M. FIERO,
Notary Public, N. Y. Co.

Marine Court of the City of New York.

ABRAHAM VAN DOLSEN *et al.*
against
WILLIAM P. ABENDROTH *et al.*

The supplemental answer of Wm. P. Abendroth, one of the defendants herein, by Arnoux, Ritch & Woodford, his attorneys.

For a defense to the cause of action set forth in the complaint this defendant pleads the order of Judge Blatchford, of the United States district court, sitting in bankruptcy, said order having been entered October 8th, 1877, and confirming the opinion of Register Dayton, filed May 8th, 1875; and this defense is set forth as a further defense, reserving the defenses set forth in the original answer.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant Abendroth.

CITY AND COUNTY OF NEW YORK, *ss:*

William P. Abendroth, being duly sworn, says he has read
29 the foregoing supplementary answer, and that the contents thereof are true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM P. ABENDROTH.

Sworn to before me the 17th day of March, 1877.

EUGENE SOULLEYT,
Notary Public, N. Y. Co.

N. Y. Marine Court.

ABRAHAM VAN DOLSEN *et al.*
against
WILLIAM P. ABENDROTH, Impleaded, etc.

Tried June 7th, 1882.

The jury, by direction of the court, find a verdict in favor of the plaintiffs for $1,482.15. Judgment accordingly, with costs and 5

per cent. allowance, as per opinion filed; 30 days to make a case and 30 days stay of execution.

D. McA., *J.*

30 *Judgment.*

N. Y. Marine Court.

ABRAHAM VAN DOLSEN and Ano.

ag'st

WILLIAM P. ABENDROTH, Impleaded, etc.

The above cause having come on duly for trial, before Hon. David McAdam, judge, and a jury, on the seventh day of June, 1882, and a verdict having been found for the plaintiffs under the direction of the court, it is now, on motion of Norwood & Coggeshall, attorneys for the plaintiffs—

Ordered and adjudged that the plaintiffs, Abraham Van Dolsen and William H. Arnott, recover of the defendant, William P. Abendroth, fourteen hundred and eighty-two $\frac{15}{100}$ ($1,482.15) dollars, the amount of such verdict, and fifty-three $\frac{10}{100}$ ($53.10) dollars, interest thereon to date, amounting to fifteen hundred and thirty-five $\frac{25}{100}$ ($1,535.25) dollars, and three hundred and nine $\frac{10}{100}$ ($309.10), costs, and one hundred and seventy-eight $\frac{92}{100}$ ($178.92), disbursements, amounting in all to two thousand and twenty-three $\frac{27}{100}$ ($2,023.27) dollars.

JOHN SAVAGE, *Clerk.*

31 Marine Court, City of New York.

ABRAHAM VAN DOLSEN and Ano.

vs.

WILLIAM P. ABENDROTH, Impleaded.

On the annexed affidavit and on the proceedings and papers in the action let the plaintiffs show cause before me, at the trial term of this court, to be held at room 21, Old City Hall, New York city, on the 10th day of January, 1883, at two o'clock p. m., or as soon thereafter as counsel can be heard, why the defendant should not have a new trial of this action or such other or further relief as may be just, and, in the meantime, let all plaintiffs' proceedings herein be stayed. Service of this order on the 5th day of January shall be sufficient.

Dated January 4th, 1883.

DAVID McADAM, *Justice.*

32 CITY AND COUNTY OF NEW YORK, *ss:*

Marine Court of the City of New York.

ABRAHAM VAN DOLSEN and Ano.

vs.

WILLIAM P. ABENDROTH, Impleaded.

Haley Fiske, being duly sworn, says he is of counsel for the defendant; that by a misunderstanding defendant's brief was not submitted before the decision hereof by Mr. Justice McAdam; that deponent desires an order to show cause why a new trial hereof should not be granted in order to be heard on the merits; that the taxation of costs is noticed for to-morrow, and deponent desires an order to show cause, with stay of proceedings in order to be heard before the entry of judgment, and for this reason the motion cannot be noticed.

HALEY FISKE.

Sworn to before me this 4th day of January, 1883.

DAVID McADAM, *Justice.*

33 & 34 N. Y. Marine Court.

ABRAHAM VAN DOLSEN and Ano.

vs.

WILLIAM P. ABENDROTH, Impleaded.

JAN'Y 10, 1883.

Present: Mr. Justice McAdam.

A motion for a new trial made during the term at which the cause was tried coming on this day on the part of the defendant on the order to show cause, dated January 4, 1883, and the affidavit of Haley Fiske, dated January 4, 1883, therein referred to, and Haley Fiske appearing for defendant in favor of the motion, and Carlisle Norwood, Jr., appearing for plaintiffs in opposition—

It is ordered that said motion be, and the same hereby is, denied, and that the stay be vacated.

D. McADAM, *Justice.*

35 Marine Court of the City of New York.

ABRAHAM VAN DOLSEN and Ano.

v.

WILLIAM P. ABENDROTH, Impleaded, etc.

GENTLEMEN: Take notice that the defendant, William P. Abendroth, hereby appeals to the general term of the marine court from the judgment entered in this action on the 12th day of January, 1883, in favor of the plaintiffs and against the said defendant, for

the sum of $2,023\frac{27}{100}$, and from each and every part of said judgment; and also that said defendant appeals, as aforesaid, from and brings up for review the order made by Justice McAdam, dated January 10, 1883, and entered on the 11th day of January, 1883, and from each and every part of said order; and also that said defendant appeals, as aforesaid, from and brings up for review the order made by Justice McAdam, dated January 11, 1883, and entered on said day, and from each and every part of said order, and especially from so much thereof as struck out the words, "Order made by Justice McAdam herein, dated November 24, 1882," from the proposed order submitted; and also that said defendant appeals, as aforesaid, from and brings up for review so much of the order made by Justice McAdam, dated on the 31st day of May, 1882, as imposed as a condition of serving the supplemental answer therein
36 described the payment to the plaintiffs' attorneys of all the plaintiffs' costs and disbursements to the date of the said order.

New York, February 12, 1883.

ARNOUX, RITCH & WOODFORD,
Attorneys for said Defendant.
WILLIAM P. ABENDROTH.

To Messrs. Norwood & Coggeshall, attorneys for plaintiffs; John Savage, clerk.

City Court of New York.

ABRAHAM VAN DOLSEN *et al.*, Respondents,
against
WILLIAM P. ABENDROTH, Impleaded, etc., Appellant.

This action was commenced by service of a summons on the 13th day of November, 1872, upon the defendant Wundram. By an order entered on the 6th day of June, 1877, the summons was amended by adding the name of the defendant, William P. Abendroth.

The defendant Griffith was not served and Wundram did not appear. Issue was joined on the 7th day of July, 1877, on behalf of the defendant Abendroth.

The plaintiffs originally appeared by Christopher Fine, Esq., and Norwood & Coggeshall were substituted on April 12th, 1877, as their attorneys; the defendant Abendroth by Arnoux, Ritch & Woodford, his attorneys.

37 There has been no change of parties or attorneys except as above.

The cause came on for trial before Mr. Justice Goepp and a jury on the 18th day of March, 1878, wherein the court directed judgment for the defendant.

Upon the plaintiffs' appeal the court reversed the judgment and ordered a new trial.

The cause came on again to be tried before Chief Justice McAdam and a jury on the 7th day of June, 1882.

Mr. Carlisle Norwood, Jr., appeared for the plaintiffs; Mr. Haley Fiske appeared for the defendant.

ABRAHAM VAN DOLSEN, one of the plaintiffs, testified:

Examined by Mr. NORWOOD:

I am one of the plaintiffs in this action. Van Dolsen & Arnott was the title of my firm in 1872, and has been ever since. The signature of the note now handed to me is the signature of George Wundram. It is the signature of Griffith & Wundram.

The amount of the principal due on that note is $900, and the interest is $581.82, making a total of $1,482.15.

(The note in suit was read in evidence.)

Cross-examined by Mr. FISKE:

Mr. Wundram was the member of the firm who signed that note. I saw him sign it. I knew Messrs. Griffith & Wundram and William P. Abendroth.

Mr. Norwood offered in evidence a certificate of limited partnership between the defendants as follows:

"This is to certify that the undersigned have formed a
38 limited partnership, pursuant to the provisions of the Revised Statutes of the State of New York and the several acts amending the same.

That the name of the firm under which such partnership is to be conducted is Griffith & Wundram.

That the general nature of the business to be transacted is the manufacture and sale of steam generators and making general job castings.

That the names of all the general and special partners are as follows: John Griffith and George W. Wundram, who reside in city, county, and State of New York, are the general partners, and William P. Abendroth, who resides in the town of Rye, county of Westchester, and State of New York, is the special partner, and has contributed the sum of ten thousand dollars in cash as the capital to be used in said business.

And the said copartnership is to commence on the first day of January, 1871, and is to terminate at the expiration of five years thereafter, and on the first day of January, 1876.

Dated this twenty-third day of December, one thousand eight hundred and seventy, at the city and county and in the State of New York.

JOHN GRIFFITH.
GEO. W. WUNDRAM.
WILLIAM P. ABENDROTH."

STATE OF NEW YORK, }
City and County of New York, } ss:

On the twenty-third day of December, 1870, before me came John Griffith and George W. Wundram and William P. Abendroth, known to me to be the individuals described in and who executed the foregoing certificate, and acknowledged to me that they executed the same.

S. L. MACOMBER,
Notary Public.

39 CITY AND COUNTY OF NEW YORK, ss:

John Griffith and George W. Wundram, of city, being duly sworn, depose and say, and each for himself saith, that he is one of the general partners named in the above certificate, and that the sum specified in said certificate to have been contributed by the special partner as the capital stock of said firm has been actually and in good faith paid in cash.

JOHN GRIFFITH.
G. W. WUNDRAM.

Sworn to before me this 23d day of December, 1870.
S. L. MACOMBER,
Notary Public.

Let the terms of the limited copartnership between John Griffith, George W. Wundram, and William P. Abendroth be published in the New York Leader and the New York Atlas, two papers published in the city and county of New York.

CHARLES E. LOEW.

(Endorsed:) Filed and recorded 23d December, 1870, 2h. 12m.

DAVID DAVIS, sworn for plaintiffs, testified:

Examined by Mr. NORWOOD:

I reside at 387 Broadway, Brooklyn, E. D.; my business in December, 1870, was book-keeper in the office of the New York Leader, which was published at that time at No. 11 Franklin street, New York city. It was published once a week, on Saturdays. The book now shown me is a bound copy of the issue of the New York Leader for the month of December, 1870. I find in the issue of December 31st a notice or advertisement of a partnership, limited,
as so called, of Griffith & Wundram. The insertion on De-
40 cember 31st was the first insertion of this advertisement.
The 31st of December, 1870, and the 24th of December, 1870, were Saturdays; the 23d was Friday.

WILLIAM P. ABENDROTH, called on behalf of the plaintiffs, being duly sworn, testified as follows:

I reside at Port Chester, town of Rye, Westchester county. I am one of the defendants in this action.

Q. Look at that check, please. Is that the check which you gave for your contribution to the capital to this copartnership?

A. This is the check; yes, sir.

Q. When was that given?

A. The day the papers were signed, to the best of my recollection—December 23d. The date of the check is December 31st.

The check was read in evidence as follows:

NEW YORK, *December* 31, 1870.

The Market National Bank pay to Messrs. Griffith & Wundram or order ten thousand $\frac{0}{100}$ dollars.

$10,000. WILLIAM P. ABENDROTH.

Endorsed: Griffith & Wundram.

This evidence was taken subject to the objection of the defendant as irrelevant, incompetent, and not pleaded in plaintiffs' complaint. Objection overruled; defendant excepted.

Cross-examined by Mr. FISKE:

Q. Has that check been paid?

A. Yes, sir.

Q. When was it paid?

A. As soon as it went to bank. I presume January 2nd.

The plaintiffs rest.

41 Defendant moved to dismiss the complaint on the following grounds:

1. That the plaintiffs had not proved facts sufficient to constitute a cause of action against the defendant Abendroth.

Motion denied and defendant excepted.

Mr. Fiske thereupon, to maintain the issues on the part of the defendant, offered in evidence the record and proceedings in bankruptcy as follows:

To the Honorable Samuel Blatchford, judge of the district court of the United States for the southern district of New York:

The petition of George W. Wundram, of the city, county, and State of New York and district aforesaid, respectfully represents—

That your petitioner is a member of a copartnership consisting of John Griffith and George W. Wundram, who is your petitioner, and carry on business under the firm name of "Griffith & Wundram;" that the copartnership carry on the business of boiler-making and general foundry business at the city of New York, within said judicial district; that the said John Griffith and your petitioner have resided for six months next immediately preceding the filing of this petition at the said city of New York, within said judicial district; that the said John Griffith is unwilling to join in this petition, and that the said John Griffith is temporarily absent from the city of

New York and from the United States and is now at the city of Liverpool, England; that the members of said copartnership owe copartnership debts exceeding the amount of three hundred dollars and are jointly and severally unable to pay all their debts in full; that your petitioner is willing to surrender all his estate and
42 effects of the said copartnership firm and of his interest therein and all his separate estate and effects for the benefit of the creditors of said copartnership and of his individual creditors and desires to obtain in his own behalf and in behalf of said copartnership the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That the schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true statement of all the debts of said copartnership, and, as far as possible, the names and places of residence of their creditors, and the further statements concerning such debts required by the provisions of such act.

That the schedule hereto annexed, marked "B" and verified by your petitioner's oath, contains an accurate inventory of all the estate of said copartnership, as required by the provisions of said act.

And said petitioner further states that the schedule hereto annexed, marked "C" and verified by your petitioner's oath, contains a full and true statement of all his individual debts, the names and places of residence of his creditors (so far as it is possible to ascertain the same), and such further statements concerning such debts as are required by the provisions of said act.

And your petitioner further states that the schedule hereto annexed, marked "C" and verified by your petitioner's oath, contains a full and true statement of all his individual debts, the names and places of residence of his creditors (so far as it is possible to ascertain the same), and such further statements concerning such debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "D" and verified by your petitioner's oath, contains an accurate inventory of all his individual estate, both real and personal, assignable under the provisions of said act.

43 Wherefore your petitioner prays that he may be adjudged by a decree of the court to be a bankrupt within the provisions of said act, and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

And your petitioner further prays that after due proceedings had the said copartnership and the members of said firm of Griffith & Wundram may be adjudged by a decree of the court to be bankrupts within the provisions of said act, and that such further proceedings may be had thereon as the law in such cases prescribes.

G. W. WUNDRAM, *Petitioner.*

MORTIMER C. ADDOMS,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

I, George W. Wundram, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information, and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

GEO. W. WUNDRAM, *Petitioner.*

Subscribed and sworn to before me this 23d day of November, A. D. 1872.

GEO. F. BETTS,
U. S. Commissioner.

44 SCHEDULE A.

Statement of all creditors who are to be paid in full or to whom priority is secured according to the provisions of the 28th section of said act.

None.

GEO. W. WUNDRAM, *Petitioner.*

SCHEDULE A.

Creditors holding securities.

None.

GEO. W. WUNDRAM, *Petitioner.*

45 Petition by debtor—No. 3.

SCHEDULE A.

Creditors whose Claims are Unsecured.

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property. The nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case and the place where such indebtedness accrued.)

Reference to ledger or voucher.	Names of creditors.	Residences and occupations.	Am't.	Where and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, &c., and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.
213	William P. Abendroth--	Port Chester, N. Y.----- Merchant.	$16,146 59	New York, December, 31, 1870, and Oct. 1, 1872.	Cash loaned copartnership. 4 notes given for $16,000. Bal. due on open ac.
210	Van Dolsen & Arnot ---	240 West 27th St., N. Y.-- Merchants.	1,918 82	New York, Aug. 7 and 9, 1872.	Merchandise sold copartnership. Two notes given for same.

Besides the preceding, the names of all other creditors appeared on schedule in the same form.

46 SCHEDULE A.

Accommodation paper.
None.

GEO. W. WUNDRAM, *Petitioner.*

(N. B.—The following form of oath to Schedule A of the petition by debtor is prescribed, and is to be annexed to the same:)

Oath to Schedule A.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

On this 23d day of November, A. D. 1872, before me personally came George W. Wundram, the person mentioned in and who subscribed to the foregoing petition and schedule, marked A, respectively, and who being by me first duly sworn did declare the said schedule to be a statement of all his debts, etc., in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

GEO. F. BETTS,
U. S. Commissioner.

SCHEDULE B.

Interest in lands.
None.

GEO. W. WUNDRAM, *Petitioner.*

SCHEDULE B.

Personal Property.

This schedule had on it a statement of all the personal property of the firm, aggregating in value the sum of $46,530.03.

G. W. WUNDRAM, *Petitioner.*

47 SCHEDULE B.

Choses in Action.

This schedule sets forth all the assets which were choses in action.
D. Unliquidated claims of every nature, with their estimated value.
None.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE B.

Property in reversion or expectancy, including property held in trust for the petitioner or subject to any power or right to dispose or to charge.

None.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE B.

A particular statement of the property claimed as excepted from the operation of said act by the provisions of the 14th section thereof, giving each item of property and its valuation, and, if any portion of it is real estate, its location, description, and present use.

(N. B.—The property claimed to be exempt under the laws of any State is to be described separately from the rest and reference given to the statute of said State creating the exception.)

(This consisted of tools and clothes.)

G. W. WUNDRAM, *Petitioner.*

48 SCHEDULE B.

The following is a true list of all books, papers, deeds, and writings relating to my trade, business, dealings, estate, and effects, or any part thereof, which at the date of this petition are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me or for my use, benefit, or advantage, and also of all others which may have been heretofore at any time in my possession or under my custody or control and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same:

(Here follows the list.)

(N. B.—Oath, as prescribed to Schedule B, to be annexed to this sheet.)

G. W. WUNDRAM, *Petitioner.*

(N. B.)—The following form of oath, Schedule B of the petition by debtor, is prescribed and is to be annexed to the same:)

Oath to Schedule B.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

On this 23d day of November, A. D. 1872, before me personally came George W. Wundram, the person mentioned in and who subscribed to the foregoing petition and schedules, marked B, respectively, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the act of Congress entitled "An act to establish

a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

GEO. F. BETTS,
U. S. Commissioner.

49 SCHEDULE A.

Statement of all creditors who are to be paid in full or to whom priority is secured according to the provisions of the 28th section of said act.

None.

GEO. W. WUNDRAM, *Petitioner.*

SCHEDULE A.

Creditors hold securities.

None.

G. W. WUNDRAM, *Petitioner.*

50 SCHEDULE C.

Creditors Whose Claims are Unsecured.

(N. B.—When the name and residence (or either) of any maker, endorser, or holder of any bill or note, etc., are unknown the fact must be stated, and also the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property; the nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and also the the true cause and consideration of such indebtedness in each case and the place where such indebtedness accrued.)

(Here follows the list.)

G. W. WUNDRAM, *Petitioner.*

51 SCHEDULE C.

Liabilities on notes or bills discounted which ought to be paid by the drawers, makers, or acceptors.

None.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE C.

Accommodation paper.

None.

G. W. WUNDRAM, *Petitioner.*

(N. B.—The following form of oath to Schedule A of the petition by debtor is prescribed and is to be annexed to the same:)

Oath to Schedule C.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

On this 23d day of November, A. D. 1872, before me personally came George W. Wundram, the person mentioned in and who subscribed to the foregoing petition and schedule marked C, respectively, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, etc., in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

GEO. F. BETTS,
U. S. Commissioner.

52 SCHEDULE D.

Statement of all real and personal estate and effects whatever which are now in possession, enjoyment, or under the control of the petitioner, or which are held by any other person in trust for his use, or to the possession or enjoyment of which he is entitled at the date of filing petition.

Interest in lands.

None.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE D.

Personal property.

None except as stated in copartnership petition.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE D.

Choses in action.

None.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE D.

Property in reversion, remainder, or expectancy, including property held in trust for the petitioner or subject to any power or right to dispose of or to charge.

None.

G. W. WUNDRAM, *Petitioner.*

53 SCHEDULE D.

A particular statement of the property claimed as excepted from the operation of said act by the provisions of the 14th section thereof, giving each item of property and its valuation, and, if any portion of it is real estate, its location, description, and present use.

None except as stated in copartnership schedule.

G. W. WUNDRAM, *Petitioner.*

SCHEDULE D.

The following is a true list of all books, papers, deeds, and writing relating to my trade, business, dealings, estate, and effects or any part thereof which at the date of this petition are in my possession or under my custody and control, or which are in the possession or custody of any person in trust for me or for my use, benefit, or advantage, and also of all others which may have been heretofore at any time in my possession or under my custody or control and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

None.

G. W. WUNDRAM, *Petitioner.*

(N. B.—The following form of oath to Schedule B of the petition by debtor is prescribed and is to be annexed to the same:)

54 *Oath to Schedule D.*

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

On this 23d of November, A. D. 1872, before me personally came George W. Wundram, the person mentioned in and who subscribed to the foregoing petition and schedule, marked B, respectively, and who, being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

GEO. F. BETTS,
U. S. Commissioner.

Also order to Griffith to show cause, dated November 23, 1872, filed in said clerk's office the same day:

In the District Court of the United States for the Southern District of New York.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Firm of Griffith & Wundram.

SOUTHERN DISTRICT OF NEW YORK, ss:

Upon reading and filing the petition of George W. Wundram for adjudication of bankruptcy of the copartnership of Griffith
55 & Wundram and against his copartner, John Griffith, duly verified and filed on the 23d day of November, A. D. 1872—

Ordered, That said John Griffith do appear at this court, as a court in bankruptcy, to be holden at the court-room, Nos. 39 and 41 Chambers street, in the city of New York, in the county of New York and State of New York and district aforesaid, on the 30th day

of November, A. D. 1872, at 11 o'clock on that day, and show cause, if any there be, why the prayer of said petition should not be granted.

And it is further ordered that a copy of said petition, together with a copy of this order, be served on said John Griffith by delivering the same to him personally or by leaving the same at his last usual place of abode in said district at least five days before the day herein required for his appearance.

Witness Hon. Samuel Blatchford, judge of the district court for the southern district of New York, with the seal thereof, at the city of New York, in said district, on the 23d day of November, A. D. 1872.

Enter.

S. B.

Also marshal's certificate of service of said order and a copy on which it is endorsed (the copy is a copy of the foregoing exhibit), dated Nov. 26, 1872, filed Nov. 30, 1872, in said clerk's office:

I hereby certify that on the 25th day of Nov., 1872, at No. 446 West 25th street, in the city of New York, I served the within order and petition upon the within-named John Griffith by exhibiting the within certified copy of order and petition to Hannah Griffith, she being the wife of the within-named John Griffith, at the same time and place, leaving with her a copy thereof; and I further certify that I have been informed and believe that the
56 said 446 West 25th street is the last or usual place of abode of the said John Griffith.

Nov. 26, 1872.

GEORGE H. SHARPE,
U. S. Marshal.

Also adjudication in bankruptcy and reference to Isaac Dayton, as register, dated November 30, 1872, filed the same day:

Adjudication of Bankruptcy. Creditors' Petition.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts. No. 3746.

At the city of New York, in said District, 30th day of November, A. D. 1872.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

This cause came on to be heard in the city of New York, in said court, and on petition filed by the above-named George W. Wundram on the 23d day of November, A. D. 1872, upon which an order was made on the 23d day of November, 1872, requiring the

57 above-named John Griffith to appear on the 30th day of November, 1872, at 11 o'clock in the forenoon, and show cause why he should not be adjudged bankrupt and why the copartnership of Griffith & Wundram should not be adjudged bankrupt; and it appearing on said return day, by certificate of George H. Sharpe, United States marshal, that said petition and said order to show cause had been duly served on the said John Griffith, and the said George W. Wundram appearing, by Mortimer C. Addoms, his attorney, and no one appearing in opposition thereto, and the said John Griffith, being called in open court, came not, but made default to appear pursuant to the terms of said order to show cause.

And thereupon and upon consideration of the proofs in said cause it was found that the facts set forth in said petition were true, and it is therefore adjudged that John Griffith and Geo. W. Wundram and the copartnership of Griffith & Wundram became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said petition, and they are therefore declared and adjudged bankrupts accordingly.

And it is further ordered that the said bankrupt, John Griffith, shall, within five days after the date of this order, make and deliver or transmit by mail, post-paid, to the marshal, as messenger, a schedule of his creditors and an inventory of his estate in the form and verified in the manner required of the petitioning debtor by the said act.

6 And it is further ordered that the above-entitled cause be referred
h 58 to Isaac Dayton, Esq., one of the registers in bankruptcy of this court, to take such proceedings thereon as are required by the said act.

r Witness the Honorable Samuel Blatchford, judge of the said
ecourt, and the seal thereof, at New York, in said district, on the 30th
rday of November, A. D. 1872.

[Seal of the Court.]

GEO. F. BETTS,
Clerk of the District Court for said District.

I, George F. Betts, clerk of the district court of the United States for the southern district of New York, do hereby certify that the above is a true copy of the original adjudication in bankruptcy made in the above-entitled matter.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, the 30th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

GEO. F. BETTS, *Clerk.*

59 *Warrant of Seizure upon Adjudication of Bankruptcy on Creditor's Petition.*

(Involuntary bankruptcy.)

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Partnership of Griffith & Wundram, Bankrupts. No. 3746.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

To the marshal of said district, Greeting:

Whereas a petition for adjudication of bankruptcy was, on the 23d day of November, A. D. 1872, filed by the said George W. Wundram, for himself, and against his copartner, John Griffith, composing the partnership firm of Griffith & Wundram, the city and county of New York, in said district, under which they have been duly declared and adjudicated bankrupts: you are, therefore, by virtue of the said petition and the adjudication thereon, and according to the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, required, authorized, and empowered, as messenger, to take possession of all the estate, real and personal, of said John Griffith, individually, except such as may be by law exempt from the operation of said act; and also all deeds,
60 books of account, and papers, as an individual, and to keep the same safely until the appointment of an assignee.

And you are also directed to publish notice twice in the newspapers called the New York Times and the New York Commercial Advertiser, printed at the city of New York, in the county of New York, the first publication to be made forthwith as follows:

"District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts.

A warrant in bankruptcy has been issued by said court against the estate of John Griffith and George W. Wundram, of the city and county of New York, of the State of New York, in said district, adjudged bankrupts upon petition, and the payment of any debts and the delivery of any property belonging to said bankrupts to them or their use and the transfer of any property by them are forbidden by law. A meeting of the creditors of said bankrupts to prove their debts and choose one or more assignees of their estate will be held at a court of bankruptcy to be holden at number three hundred and twenty-two (322) Broadway, city of New York, room No. 6, in said district, on the

twentieth day of December, A. D. 1872, at twelve oclock m.,
61 at the office of Isaac Dayton, one of the registers in bankruptcy of said district.

——— ———,
U. S. Marshal for said District."

And you will also serve a written or printed notice by mail on all creditors upon the schedule filed with said petition, all whose names may be given to you by said bankrupts (within five days from the date of such adjudication) within ten days after date hereof, and also to said John Griffith and George W. Wundram, the bankrupts, which notice shall be as follows:

"In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Partnership of Griffith & Wundram, Bankrupts.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

To ——— ———, one of the creditors of said John Griffith and George W. Wundram, bankrupts:

This is to give you notice—

First. That a warrant in bankruptcy has been issued against the estate of John Griffith and George W. Wundram, bankrupts aforesaid.

62 Second. That the payment of any debts and the delivery of any property belonging to said bankrupts to them or to heir use and the transfer of any property by them are forbidden y law.

Third. That a meeting of the creditors of the said bankrupts to rove their debts and to choose one or more assignees of estate will e held at a court of bankruptcy, to be holden at number three hunred and twenty-two (322) Broadway, in the city of New York, oom No. 4, in said district, on the twentieth day of December, 1872, t twelve o'clock m., at the office of Isaac Dayton, one of the regisers in bankruptcy of said court.

And the following are the names of the creditors of said bankupts and the amount of their debts, as given to me by George W. Wundram, one of the said bankrupts, and as set forth in said schedule."

And have you then there this warrant with your doings thereon.

In witness whereof I have hereunto set my hand and caused the seal of this court to be affixed, at New York, this 30th day of November, in the year of our Lord 1872.

[L. S.] SAM'L BLATCHFORD,
District Judge.
GEORGE F. BETTS,
Clerk of the Court.

Also offers marshal's notice to creditors to prove debts and attend meeting, returnable December 20th, 1872.

(This is same as fol. 159, *ante*, except that this is signed George H. Sharpe, marshal's messenger.)

Also publication of notice in the Times and Commercial.

(Same as fol. 159, *ante*, beginning with the words "district court" and ending "George H. Sharpe, marshal's messenger.")

63 Also affidavit of publication in the Times, verified 9 December, 1872:

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Theodore L. Peverelly, being duly sworn, saith that he is principal clerk in the office of the New York Times, a newspaper printed and published in the city of New York; that the advertisement hereto annexed has been regularly published, commencing on the 7th day of December, 1872, in the said New York Times two times successively.

THEODORE L. PEVERELLY.

Sworn to before me this 9th day of December, 1872.

D. P. McBRIEN,
Notary Public, N. Y. Co.

Also affidavit of publication in Commercial Advertiser, verified 17th December, 1872:

OFFICE N. Y. COMMERCIAL ADVERTISER.

STATE OF NEW YORK, }
City of New York, } *ss:*

Edward S. Ralphs, of the city of New York, being duly sworn, says that he is the principal clerk employed in the office of the New York Commercial Advertiser, a daily newspaper published in said city, and that the notice, of which the annexed is a copy, has been published in the said New York Commercial Advertiser on the 6th and 7th days of December, 1872.

EDWIN S. RALPHS.

Sworn to before me this 17th day of December, 1872.

WM. HASTINGS,
Notary Public, City and County of New York.

Also marshal's certificate of mailing and publication, dated December 20th, 1872:

64 *Return by Marshal thereon.*

DISTRICT OF ——, *ss:*

By virtue of the within warrant I have published notice by advertisement on two different days in the newspapers above men-

tioned, the first publication of which was on the 6th day of December, A. D. 1872. I also, within ten days after the date of the within warrant, sent written or printed notice, as within directed, to the within-named John Griffith and George W. Wundram, bankrupts, and to the creditors named in the schedule delivered to me by the attorney for the petitioning creditors and herewith returned. The notices sent by mail were deposited in the post office at New York city on the 7th day of December, A. D. 1872, with the proper postage stamp affixed thereto, and those delivered personally by me to said creditors were delivered at the times and the places set opposite to the name of each, and all of said notices were according to the directions set out in this warrant, and the notices to Thos. A. McIntire and Mrs. Ormby have been returned to me from the post office. I have not taken possession of any property of the within-named bankrupts, as none has come to my knowledge.

GEORGE H. SHARPE, *Marshal.*

Also assignment of assets to I. Dayton, dated 3d December, 1872.

Defendant's counsel also offered the assignment of assets to the register under the adjudication:

65 In the District Court of the United States for the Southern District of New York.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts.

At the office of the register, No. 322 Broadway, in the city of New York, in the southern district of New York, on the third day of December, A. D. 1872.

Before Mr. Isaac Dayton, one of the registers in bankruptcy of said court.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

We, John Griffith and George W. Wundram, lately carrying on business as boiler-makers and foundrymen at West Twenty-seventh street and Eleventh avenue, in the city of New York, under the name of Griffith & Wundram, do hereby surrender to Isaac Dayton, Esquire, one of the registers of the district court of the United States for the southern district of New York, in bankruptcy, to whom the proceedings on the said petition have been referred, all our estate, property, assets, and credits, machinery, fixtures, tools, and apparatus used in our business as boiler-makers and foundrymen aforesaid, stock in trade, choses in action, and all other of our property and estate whatsoever, whether real or personal, and all property, effects, assets, and credits in which the said Griffith
66 & Wundram have or may have any right or interest, excepting such property as is exempt by law from the operation of the bankrupt act of March 2, 1867, and authorize the said Isaac Day-

ton, as such register, to take possession, care, and custody of the same.

Dated New York, December 3d, 1872.

GRIFFITH & WUNDRAM,
Per G. W. WUNDRAM.

Also offers election of Wm. P. Abendroth as assignee of the firm of Griffith & Wundram, dated Dec. 20, 1872, with Mr. Abendroth's acceptance, of the same date:

Choice of Assignee.

First meeting of creditors.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts.

At the office of the registrar, at No. 322 Broadway, in the city of New York, in said district, on the twentieth day of December, A. D. 1872.

Before Mr. Isaac Dayton, registrar in bankruptcy.

67 SOUTHERN DISTRICT OF NEW YORK, *ss:*

MEMORANDUM.—This being the day appointed by the court for the first meeting of creditors in the above bankruptcy, and of which due notice has been given in the newspapers called the New York Times and the New York Commercial Advertiser, and by special notice, served personally or through mail, we, whose names are hereunto written, being the greater part in number and value of the creditors of the said Griffith and Wundram, bankrupts aforesaid, present at this meeting, and who have proved our debts, have chosen, and do hereby nominate and choose, William P. Abendroth, of the city of New York, in the State of New York, iron founder, to be assignee of the said bankrupts' estate and effects; and we do desire that he may be appointed such assignee accordingly.

Names of creditors above mentioned.	Residence of the same.	Amount of assets.
Richard Heckscher, Jr.,	111 Broadway	$1,644 37
Hugh McGarry,	608 E. 16th street	32 18
Joseph McDonnald & Co.,	544 W. 28th St.	691 93
Colwell & Brother,	547 W. 27th	5,147 00
Van Santvoord & Hauff,	41 Park Row	152 15
W. C. Allison & Sons,	per 40 John St., N. Y.	
W. B. Wilkins, att'y,	Junction Car Works, Phila.	12,967 63
Smith Bros.,	cor. Jay and Plymouth Sts., Brooklyn, N.Y.	6,325 56
Amherst Wight & Son,	per Amherst Wight, Jr., 119 Broadway, N. Y.	399 28
John F. Mills,	Port Chester, N. Y.	960 29

The following-named creditors who have proved their debts—that is to say:

Benjamin F. Judson	6,965 20
Holden, Hopkins & Stokes	672 05
H. A. Rogers & Co.	119 99
Lawrence V. Conover	511 35
Spencer, Martin & French	292 26
68 Maurer & Weber	1,501 13
Peck & Wandell	1,123 25
Edmund Allt	215 06
N. Y. Belting and Packing Co.	105 02
A. Schmidt Bros.	141 34
George Stump	1,151 10
Rylance & Gaskell	215 99
Salamander Grate Bar Co.	253 47
R. A. Brick & Co.	272 67
Charles Merrill & Sons	54 89
The Chalmers Spence Co.	1,200 04
Elias Kimball	234 50
Holmes & Lisberger	3,561 09
Morris, Tasker & Co.	2,501 00
Charles C. Collier	74 13
Fairbanks & Co.	466 99
C. T. Raynolds & Co.	49 53
R. Henry Hoagland	3,266 09
Wm. P. Abendroth	17,215 69
Heim and Zimmermann	33 81
Nelson, Finkel & Co.	40 25
J. & G. W. Bown	28 00
Denmead & Son, Baltimore, Md.	5,948 28
West Side Bank	10,000 00
Eddy, Cutter & Co.	329 17
Wm. Schlemmer & Co.	242 34
G. W. Gallaway	78 00
Abendroth Brothers	

By WM. P. ABENDROTH,
Attorney-in-Fact, 109 Beekman Street, New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, William P. Abendroth, above named as assignee, do hereby accept the said trust.

Dated New York, 20th December, 1872.

WM. P. ABENDROTH,
109 *Beekman Street.*

Also order of the register appointing Mr. Abendroth assignee of same, dated Dec. 20, 1872:

69 SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, Isaac Dayton, one of the registers of the district court of the United States for the southern district of New York, in bankruptcy, do hereby approve of and confirm the said choice of assignee.

Dated New York, 20th December, 1872.

ISAAC DAYTON,
Register in Bankruptcy.

Also order of the judge approving the same—same date:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

At the city of New York, in the southern district of New York, the 20th day of December, 1872, I, Samuel Blatchford, judge of the district court of the United States for the southern district of New York, hereby approve of the election and appointment of the above-named assignee.

SAMUEL BLATCHFORD,
Judge of the District Court of the United States for the Southern District of New York.

Also the acceptance of the appointment by Mr. Abendroth, dated 3 Feb., 1873:

70 *Request of Assignee or Trustee under Section 27.*

(For general meeting of creditors.)

In District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Partnership of Griffith & Wundram, Bankrupts.

SIR: I, William P. Abendroth, the assignee in bankruptcy of the estate and effects of the bankrupts aforesaid, respectfully represent that I have duly accepted and entered upon the duties of said trust; that the period of three months has not elapsed since the date of the adjudication of bankruptcy in said case, and request that the court will order a general meeting of the creditors of said bankrupts, to which I may make report of my proceedings in the trust, according to the provisions contained in the 27th section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

Dated New York, the 3d day of February, A. D. 1873.

WM. P. ABENDROTH, *Assignee.*

Also notice of application of Mr. Abendroth and order for a second meeting of creditors, with proof of service on the creditors, dated Feb. 3, 1873, meeting to be held Feb. 18, 1873:

71 *Order for Meeting of Creditors under Section 27.*

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Firm of Griffith & Wundram, Bankrupts. No. 3746.

SIR: You are hereby notified that a second general meeting of the creditors of the above-named bankrupts will be held on the 18th (eighteenth) day of February, A. D. 1873, at 12 (twelve) o'clock noon, before Isaac Dayton, one of the registers of the said court, in bankruptcy, at his office, No. 322 Broadway, New York, room 6, for the purpose named in the twenty-seventh section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867.

Dated New York, 3d February, 1873.

WILLIAM P. ABENDROTH, *Assignee.*

To creditors of said bankrupts.

72 In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Upon the application of William P. Abendroth, assignee of the estate of Griffith & Wundram, bankrupts, it is—

Ordered that a second general meeting of the creditors of said bankrupts be held at number 322 Broadway, in the city of New York, in said district, on the eighteenth day of February, A. D. 1873, at 12 o'clock m., at the office of Isaac Dayton, one of the registers in bankruptcy in said district, for the purposes named in the twenty-seventh section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

And it is further ordered that the assignee give notice of said meeting by sending written or printed notices by mail, postpaid, for the time and place of said meeting to all known creditors of said bankrupts, and that he also notify the bankrupts to be present thereat, and that he shall also publish notice of the time and place of said meeting on two different days in the newspaper called the New York Commercial Advertiser, printed in the city of New York, at least ten days prior to said meeting.

73 Witness the Hon. Samuel Blatchford, judge of the said district court, and the seal thereof, at the city of New York, in said district, on the 3d day of February, A. D. 1873.

[SEAL.] GEO. F. BETTS,

Clerk of District Court for said District.

Order granted and issued this third day of February, A. D. 1873, by me—

ISAAC DAYTON,
Register in Bankruptcy.

Also affidavit of service of notice, verified 17 Feb., 1873, and the publication of notice, three papers, marked Ex. 18.

Form of Return of Assignee to be Submitted to the Register in Bankruptcy Presiding at said Meeting.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, William P. Abendroth, assignee of the estate of Griffith & Wundram, bankrupts, being duly sworn, declare that I have caused the notices required by the foregoing order to be published in the newspaper called the New York Commercial Advertiser, printed at the city of New York, on the 7th and 10th days of February, 1873, and that I have caused written or printed notices of the time and place of said meeting to be sent by mail, postpaid, to all known creditors of said bankrupts.

Said notices were mailed at the post-office in the city of New York on the 8th day of February, A. D. 1873, at least ten days prior to the date appointed for the said meeting.

WM. P. ABENDROTH, *Assignee.*

74 Subscribed and sworn to, at the city of New York, this seventeenth day of February, A. D. 1873, before me—

ISAAC DAYTON,
Register in Bankruptcy.

Also petition of McDonald, verified 6 August, 1873.

In the United States District Court, Southern District of New York.
In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Comprising the Firm of Griffith & Wundram. No. 3746.

To the Hon. Isaac Dayton, register in bankruptcy:

The petition of Joseph McDonald and James McDonald, comprising the firm of Joseph McDonald & Company, respectfully shows—

That your petitioners are creditors of the above-named bankrupts, and that the debt due to your petitioners has been duly proved in this proceeding.

That in the course of an examination of William P. Abendroth, assignee of such bankrupts, it has been made to appear that on the 21st day of November, 1872, two days before the filing of the petition herein and while the papers were being prepared, a large number of the creditors of said bankrupts entered into a written agreement with said Abendroth whereby they sold to him and

75 he purchased from them their claims against said bankrupts at twenty-five cents on the dollar, payable in his note; and your petitioners beg leave to refer to the testimony as taken as aforesaid, and that the same may be made a part of this petition; that the paper hereto annexed, marked A, is a copy of said written agreement; that subsequently thereto other of the creditors of said bankrupts accepted the terms of said agreement without, however, signing the same, and these several claims have been duly assigned to said Abendroth.

That thereupon the several parties who had so sold their claims appeared before your honor and other registers and signed and swore to papers purporting to be proofs of debts due to them, as required by the 22d section of the bankrupt act.

That the schedule hereto annexed, marked B, contains a statement of all of the claims purchased by and assigned to said William P. Abendroth which had been proven by the original creditors, together with the names of the parties proving and dates of such proof.

That the schedule hereto annexed, marked C, contains a statement of the debts proved against said bankrupts which do not appear to have been assigned to said Abendroth.

That it now appears before your honor, in the examination aforesaid, each and every of the depositions or proofs mentioned in Schedule B contains statements which are false in fact, as none of the affiants had, at the time of making such proof, any interest in the claims which they undertook to prove or any demand whatever upon the said bankrupts or their estates, and also that they and each of them had made bargains relative to said claims in opposition to the bankrupt act; that the said William P. Abendroth, at the first meeting in bankruptcy, voted upon all or a large portion of said claims and was thereby enabled to elect himself the assignee of said bankrupts, and has since acted as such, notwithstanding the
76 fact that said Abendroth was a special partner in said bankrupt firm.

That the proofs respecting the several debts in Schedule B, opposite which an asterisk is placed—thus, *, are further defective in that they do not conform to the 22d section of the bankrupt act, the blanks therein not having been filled in prior to verification.

Wherefore your petitioners respectfully protest against the allowance of any and all of said claims, and to the end that the several proofs of debt may be expunged and said claims rejected your petitioners pray that an order may issue for a re-examination of each and every of said claims, agreeably to general order No. 34 and the rules and practice of this court, or for such other order or relief in the premises as may be just.

JOSEPH McDONALD & CO.,
By JOSEPH McDONALD.

C. C. LEEDS,
Solicitor for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Duly verified Aug. 6, 1873.

Also order on said petition dated August 6, 1873, filed August 11, 1873.

It is ordered that the said petition be heard before the said register, at the chambers of this court in bankruptcy, at his office, No. 322 Broadway, in the city of New York, on Thursday, the fourteenth day of August, 1873, at 12 o'clock noon, and that five days' notice of this order be given by mail addressed to said creditors.

Witness the Honorable Samuel Blatchford, judge of the said court, and the seal thereof, at the city of New York, on the sixth day of August, A. D. 1873.

[SEAL.] GEO. F. BETTS,
Clerk of the District Court for said District.

77 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Order granted and issued this 6th day of August, A. D. 1873, by—
ISAAC DAYTON,
Register in Bankruptcy.

Also paper signed by the register in connection with said petition dated April 30, 1875.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Bankrupts. No. 3746.

At the office of the register, No. 322 Broadway, in the city of New York, in the southern district of New York, on the thirtieth day of April, A. D. 1875, before Mr. Isaac Dayton, one of the registers in bankruptcy of said court.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Opinion of the Register.

The questions arising at this second general meeting of the creditors of the bankrupts above named and upon the petition of Joseph McDonald & Company for the examination of certain claims filed against the estate of the bankrupts are—

First. Is the account exhibited by the assignee a just and true account of all his receipts and payments?

78 Second. It appearing from the account exhibited by the assignee that there is money in the hands of the assignee distributable among the creditors of the bankrupts, what are the rights of the parties interested in such distribution?

There has not been exception taken to the account exhibited by the assignee. In the absence of any exception to the account it is to be concluded, not only that the assignee has accounted for all the money and property of the bankrupts which came into his hands as assignee in bankruptcy of their estate, but that he has charged himself with all moneys and property with which he is justly chargeable. There is in this conclusion this significance: that whatever may be determined as to the effect of the assignee's having become the owner of the claims against the estate of the bankrupts of some of the creditors of the bankrupts, his administration of the trust committed to him has been conducted in an unobjectionable manner and in the best interest of all the creditors of the bankrupts. At any rate, the account exhibited by the assignee is a just and true account of all his receipts and payments. The only remaining question is, "What are the rights of the parties interested in the distribution of the moneys belonging to the estate in bankruptcy of the bankrupts remaining in the hands of the assignee."

It appears by the evidence taken at this second general meeting of the creditors of the bankrupts that John Griffith and George W. Wundram, the bankrupts in this bankruptcy, were the general partners of the limited partnership of Griffith & Wundram, of which William P. Abendroth, the assignee in bankruptcy in this bankruptcy, was the special partner; that on or about the twenty-first day of November, 1872, the firm of Griffith & Wundram being in difficulty, at a meeting of the creditors of the concern, Abendroth and some twenty-three of the creditors of Griffith & Wundram signed a paper in the words following:

79

"I, William P. Abendroth, hereby agree with the undersigned creditors of Griffith & Wundram to purchase their claims against said firm to the amount set opposite their names at the rate of twenty-five cents for each and every dollar of said claims and to pay the same in my notes, payable in equal installments of three, six, and nine months from this date, without interest; and we, the undersigned creditors, do agree with said Abendroth to sell and assign to him or to such person as he may direct our said claims at the rate aforesaid, and to accept payment therefor in his notes as above mentioned."

Dated Nov. 21, 1872.

" Morris Tasker & Co.	$2,500 00
" Rylance & Gaskell	214 00
" Peck & Wandell	1,100 00
" J. J. Richard, by L. S.	66 10
" Holmes & Lisberger	3,700 00
" Spencer, Martain & French	300 00
" Edmund Allt	200 00
" W. C. Allison & Son, about	13,000 00
" Geo. Stump, per Geo. W. Stump, att'y	1,175 00
" The Chalmers Spence Co., per J. Holmes, manager	1,173 91
" L. V. Conover, per B. F. Judson	495 00

" B. F. Judson	$7,000 00
" Elias Kimball	233 29
" Maurer & Weber	1,678 58
" Fred. Storm & Co., per F. S.	539 00
" N. Y. Belting & Packing Co., per Henry Redfield, sec'y	105 02
" A. Schmidt & Bros., about	50 00
" Woodward Steam Gun M'f'g Co., N. H. N. Cannon, sec'y, about	2,500 00
" Jos. Mason, p. D. S.	112 00
" H. A. Rogers & Co.	120 00
80 " Holden, Hopkins & Stokes	672 05
" Salamander Grate Bar Co., per G. H. Clarke, agent	251 24
" Charles Merrill & Sons	54 89"

That no claims against Griffith & Wundram having been sold and assigned to Abendroth, and the petition in bankruptcy having been filed on the twenty-third day of November, 1872, nearly all the creditors who had signed this paper proceeded to prove their respective debts against the bankrupts. Having proved their debts, these creditors severally executed and delivered to Abendroth assignments of their respective claims, thus proved against the bankrupts, and against the estate in bankruptcy of the bankrupts, and by letters of attorney made him their attorney in-fact to represent them respectively at meetings of creditors in this proceeding in bankruptcy; and Abendroth made and delivered to these creditors, respectively, his notes at three, six, and nine months, for twenty-five cents on the dollar of their claims, respectively. With a few exceptions, all the creditors who signed the paper of the 21st November, 1872, so proved and assigned their debts, and gave letters of attorney to Mr. Abendroth previously to the first general meeting of the creditors of the bankrupts. Abendroth having at that meeting been elected assignee in bankruptcy of the estate, etc., of the bankrupts, it is now on the part of Messrs. Joseph McDonald and Company, creditors of the bankrupts, the contesting creditors at this meeting, contended—

That as to the claims of the several creditors who signed the paper of the 21st November, 1872, the same have not been proved in this bankruptcy, and cannot be allowed; also that, whether allowed or not, Abendroth cannot receive any dividends on these claims.

The debts which became the subject of the paper of the 21st November, 1872, were all debts which the bankrupts actually
81 owed, and were provable against the estate in bankruptcy of the bankrupts. They were as much debts against the bankrupts as the debts which the bankrupts owed to the contesting creditors at this meeting. Apart from the paper of the 21st November, 1872 and the assignments to Abendroth, those debts were to be equally taken into account in determining as to the distribution of the bankrupts' assets and computing dividends as any other debts of the bankrupts. If those creditors had not assigned their claims

they would have been entitled to participate along with all the other creditors of the bankrupts *pro rata* in the distribution of the assets of the bankrupts; or, apart from the question raised as to the effect of Abendroth having been a special partner of the firm of Griffith & Wundram, if Abendroth had not been chosen assignee in bankruptcy of the estate and effects of the bankrupts, as the assignee and representative of those creditors, and having, by an order under general order number XXXIV, been subrogated to them respectively, he would have been entitled to the dividends on their debts against the bankrupts, and the dividends of all the other creditors would have been the same.

In what particular has this condition of things been varied by the paper of the 21st November, 1882—the assignment of the claims to Abendroth and his appointment as assignee in bankruptcy? Has dividend or *pro rata* shown of every creditor in the estate of the bankrupts been to the smallest extent diminished?

The unanimous assent of the creditors to the correctness of Abendroth's accounts as assignee determines that these transactions have not injured any one interested in the estate of the bankrupts. If Abendroth is to be deprived of the dividends out of the estate of the bankrupts on the amounts of these claims, it must be by virtue of some occult principle of justice which punishes a man for not doing another an injury. Abendroth has himself proved a debt of
82 seventeen thousand two hundred and fifteen dollars and sixty-nine cents against the estate in bankruptcy of the bankrupts. In what particular are his rights in the distribution of the funds of the estate in bankruptcy in respect to that claim different from his rights in such distribution in respect to the assigned claims in question? That he is entitled to his dividend along with the other creditors on this debt of seventeen thousand dollars and upwards is not disputed. It is not easy to discover the principle upon which a distinction is to be drawn between his rights as an original creditor and his rights as assignee of the claims of these several original creditors.

The fact that Abendroth had become the assignee of these claims and the fact that he had been the special partner of the firm of Griffith & Wundram or either of these facts may have been sufficient reasons or a sufficient reason why Abendroth should not have been chosen assignee in bankruptcy of the estate of the bankrupts; or, having been chosen such assignee by the vote of the creditors, why the choice should not have been approved by the register and confirmed by the district judge; but having become such assignee in bankruptcy, and having, as shown by his accounts, administered the trust with exact justice to all parties interested in the estate, and having done no wrong to any of such parties, either by taking the assignment of the claims which were assigned to him or by any other act, he stands, as a creditor of the bankrupts, it is submitted, in precisely the same attitude and with precisely the same rights as if he had never been chosen assignee in bankruptcy of the estate of the bankrupts.

Now, in this view of these transactions, does it seem to be very

material that blank forms for the assignment of these claims were printed by a printer who does printing for the register, or that these assignments were, for the most part, executed in the office of the register and their execution acknowledged before him? If
83 there was evidence to show a design on the part of this assignee to practice any imposition or fraud upon the creditors who should assign their claims, or any intent on his part to secure for himself a preference or any advantage of any kind over the other creditors of the bankrupts, this might have furnished a subject for comment; but the evidence is all and overwhelmingly the other way, and the circumstance that it happened to be convenient to have these assignments executed when and at the place where they were executed is not entitled to any weight in the discussion o the questions arising upon this accounting; so it does not even call for explanation.

And it is to be remarked: Abendroth is the assignee in bankruptcy of the estate of these bankrupts by the vote of the creditors of the bankrupts. He derives his position directly from the *cestui que trust* themselves. He is not an assignee thrust upon the creditors by the debtors, or made such by a court or other authority. All the creditors of the bankrupts had an opportunity to be heard in respect to his election and appointment. Joseph McDonald & Company, the creditors making the contest at this second general meeting of creditors of the bankrupts, whose claims amounted to six hundred and ninety-one dollars and ninety-three cents; Colwell Brothers, whose claim amounted to five thousand one hundred and forty-seven dollars, and Smith Brothers, whose claim amounted to six thousand three hundred and twenty-five dollars and fifty-six cents, none of whom had entered into the agreement of the 21st of November, and W. C. Allison & Sons, whose claim amounted to the sum of twelve thousand nine hundred and sixty-seven dollars and sixty-three cents, who, although they had signed the agreement, had not assigned their claim—all signed the paper at the first meeting of the creditors of the bankrupts, choosing Abendroth to be the assignee in bankruptcy of the estate and effects of the bankrupts (see "Choice of Assignee" among the exhibits in evidence), and,
84 according to the recollections of the undersigned, of the testimony, the election of Abendroth was unanimous.

That such an assignee is amenable to all the strict rules which apply generally to trustees admits of no doubt, but as a creditor of the bankrupts or as the lawful representative of other creditors he has rights under the bankrupt law which do not come within the operation of those rules. The account exhibited by the assignee shows that the percentage of dividend which the assets of the estate of the bankrupts will pay is less than the percentage which Abendroth paid for the claims in question; but whether this were so or not is no concern of the other creditors. Even if he had made a profit by the purchase of these claims of the other creditors, so long as such profit was not made at the expense of the other creditors of the bankrupts and so long as he has justly and for the best interests of the body of creditors of the bankrupts administered the trust as

assignee, no fault lies in him, and his conduct in no way merits the disapprobation of the court.

It may not be unlikely in this case that the considerations and motives which have their influence in these transactions might be stated something after this manner. Having been a special partner in the business carried on by the bankrupts, when Griffith & Wundram failed, Abendroth was disposed to effect a settlement with their creditors upon the most liberal terms which under the best possible disposition of their assets could be afforded. All the creditors of Griffith & Wundram, it would seem, were invited to attend or were represented at the meeting of creditors held at the Astor House on the 21st November, 1872. There was no suggestion that the assets of the insolvent concern could be made to pay more than twenty-five cents on the dollar. The paper of the 21st November, 1872, was drawn and was signed by nearly all the creditors who attended the meeting.

85 There is not any charge or even insinuation that anything was conceded or that the arrangement was entered into otherwise than fairly, openly, and above board. The creditors who signed the paper having for the most part proved their debts and assigned their debts as proved to Abendroth, he appears at the meeting of creditors as their attorney-in-fact for the purpose of choosing an assignee. The other creditors knew all about the paper and how Abendroth stood in reference to those creditors who had signed it and whom he now represented in the choice of an assignee. Nothing was kept back. Abendroth's familiarity with the peculiar branch of mechanical industry which had constituted the business of Griffith & Wundram would, it may be supposed, very strongly commend him to the sound judgment of the creditors of these bankrupts as by all odds the most suitable person to be intrusted with the disposition of their assets. Abendroth himself might fairly be supposed to see that by becoming assignee in bankruptcy he would be able, whilst giving every creditor of the bankrupts the benefit of his superior management of the property, so to administer the trust as to mitigate in some degree the losses and responsibilities which he had incurred from his connection with the concern of Griffith & Wundram. He, however, it would appear from the evidence, was reluctant to accept the assigneeship. It was obvious that although he might, as assignee, manage the property better than any one else, still he would be as well off to let the creditors select whom they pleased, and, as the assignee of the creditors who had assigned to him their claims and avoiding all questions, take his dividends, whatever they might amount to, out of the avails of the assets. In that case, while the assignee would have been a person of his selection, he might have become the purchaser of the stock of machinery and tools of Griffith & Wundram without accountability to any one, which might have turned out to some extent to his ad-

86 vantage, but with the full knowledge on the part of all the creditors of his ownership of the claims which have been assigned to him, and as their unanimous choice he became the assignee.

It is insisted on behalf of the contesting creditors that the result of all this is that the claims against the bankrupts which were assigned to Abendroth are confiscated for the benefit of the estate in bankruptcy, and that the dividend which would have been payable on those claims in the hands of the original creditors is to be regarded as a forfeiture to be distributed *pro rata* among the other creditors of the bankrupts. Inasmuch as it is certain that Abendroth in all these transactions acted in total ignorance of any such rule of law, and, at the same time, in entire good faith towards all the creditors of the bankrupts, and inasmuch as the other creditors of the bankrupts have neither been injured by Abendroth's mistake nor, excepting as resulting from that mistake, have any claim to this bounty, it would be no more than just and equitable, if such are the legitimate consequences of his action, to allow him now to withdraw from the assigneeship and resume his position as the representative of the assigned claims. The law, the undersigned supposes, looks at the facts and substance of the case and, discerning in these no wrong, finds nothing either to require correction or to call for condemnation.

The statute, section XXII, Revised Statutes of the United States, § —, provides as follows:

To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing, on oath or solemn affirmation, before the proper register or commissioner, setting forth—

That the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into by or in behalf of such creditor to sell, transfer, or dispose of the said
87 claim or any part thereof against such bankrupt, or to take or receive, directly or indirectly, any money, property, or consideration whatever whereby the vote of such creditor for assignee or any action on the part of such creditor, or any person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true.

Whatever may be the legal interpretation or effect of the paper of the 21st November, 1872, it is perfectly clear that at the time it was signed it did not contemplate any control over or influence upon proceedings in bankruptcy.

At the meeting of creditors of the 21st November, 1872, it was stated that papers for the institution of proceedings in bankruptcy were in the course of preparation; but there is not anything to show that in the minds of the parties signing the paper the paper signed at that meeting had or was intended to have any bearing whatever upon those proceedings; nor at the several times the creditors who had signed the paper and proved their claims previously to the first meeting of creditors, or at that meeting, had the subject of the selection of an assignee or the management of the proceedings in bankruptcy been as much as mentioned. Supposing that these provisions are intended to prevent bargains between creditors as to the

election of an assignee, there is not any evidence of any bargain in this case. The evidence is all the other way. The creditors themselves, in their respective depositions for the proof of their claims, expressly swear that no bargain or agreement, express or implied, has been made or entered into by or on behalf of the deponents to sell, transfer, or dispose of their respective claims or any part thereof against the bankrupts, or to take or receive, directly or indirectly, any money, property, or consideration whatever whereby the vote of the deponents for assignee or any action on the part of
88 the deponents, or any other person in the proceedings under said act, has been, is, or shall be in any way affected, influenced, or controlled; and all the attending facts and circumstances and the natural probabilities of the case corroborate the positive statements of these depositions. All which these creditors cared for was to get their twenty-five per cent., and they were utterly indifferent who should be chosen assignee or what became of the proceedings in bankruptcy. To say that because the claims were assigned to Abendroth and because, further, as the representative of those creditors, he voted for himself, they are to be presumed to have intended, when they assigned to him their claims, that he should vote for himself, and therefore there was a bargain, is purely a refinement and goes utterly beyond the reasonable inferences warranted by the evidence and the facts.

There is not anything peculiar in a claim against a bankrupt that it should not be bargained about and made an object of sale, the same as a claim against any other debtor. The sale and transfer of choses in action not negotiable formerly was not favored, but the rule is different now. Agreements which are intended to influence the proceedings in bankruptcy are prohibited, but it would be an extreme hardship if a creditor of a bankrupt should not be allowed to do what he thought best with a desperate claim, and by selling it put an end to all uncertainty and perhaps anxiety about it; and he ought not to be obliged or expected to concern himself about the question as to who should subsequently be chosen assignee in bankruptcy of the estate of the bankrupt, nor is any wrong to be imputed to the purchaser of such claim. If, by becoming the assignee of a claim, he seeks to influence or control the appointment of the assignee in bankruptcy, and to secure for himself an advantage over the other parties interested in the estate in bankruptcy, the law will stand in his way; but not only where there is not any proof of any purpose to violate the statute, but the evidence shows that
89 the whole conduct of the assignee has been calculated — promote the best interests of all parties entitled to share in the bankrupt estate; the mere fact that the assignee in bankruptcy is the assignee of some of the claims against the bankrupt estate will not, it is apprehended, be admitted to prejudice those claims upon the distribution of the funds of the estate in the hands of the assignee.

And whether the legal effect of the paper in question was to work an immediate transfer of the claim to Abendroth or not, it is perfectly plain that the parties did not understand that the paper had any such effect, and the same result is reached whichever way the

paper is interpreted, whether as of itself conveying the property in the claims to Abendroth or as an executory contract to be subsequently performed by the delivery of the claims on the one part and the delivery of the note on the other. If the language of the paper demands the former interpretation, Abendroth himself ought to have proved these claims.

This would have made no difference in the result. As the claims are sworn to by the original claimants, the proof is far more satisfactory than proof on the oath of an assignee on information and belief. If the paper assigned the claims the assignment was before the commencement of the proceedings in bankruptcy, and the proof would not require the oath of the original creditor. The thing is substantially right as it is and the meaning of the paper is a matter of indifference.

The rule that in construing a contract the court will be guided by the understanding of the parties to the contract at the time of the making of the contract as to its meaning is a fair one in the case. There is not any question between the parties to this paper as to its meaning. Their acts and the depositions of the respective creditors proving their claims against the estate in bankruptcy of the bankrupts show that they understood the paper. Not one of
90 the creditors of Griffith & Wundram who signed this paper is before the court to complain that it has not been rightly understood or justly performed.

The proposition of the contesting creditors on this accounting is that the parties to this paper misapprehended its meaning; that although such misapprehension has not been in the smallest measure detrimental to the contesting creditors, they have the right not to have the construction of the paper rectified, because they have not any concern in that matter, but to have all the claims proved against the bankrupts and assigned to Abendroth stricken from the list of debts against the estate of the bankrupts, and in consequence their debts paid in full. It is submitted that the construction of this paper, according to the understanding by the parties to it of its meaning, as it is just as between those parties and does no injury to any other creditor, is just and conclusive as to the other creditors of the bankrupts.

If the construction of this paper is to be regarded as a question for the determination of this court on this accounting of the assignee, the undersigned is of the opinion that the construction given to it by the parties to the paper is precisely the just legal construction of the paper. Abendroth agrees to purchase and the creditors agree to sell, but clearly, by the terms of the paper, no property passes from the creditors to Abendroth until Abendroth had given his notes as provided by the paper. Any creditor who signed a paper on a tender to Abendroth of an assignment of his claims against Griffith & Wundram and demand — Abendroth's notes at three, six, and nine months for twenty-five per cent. of the claim, and upon Abendroth's refusal to give such notes, might maintain an action against Abendroth for damages for non-performance of the stipulations of the paper, or perhaps a suit in equity for a specific performance;

or, on the other hand, Abendroth on a tender to any creditor who signed the paper of his notes at three, six, and nine months,
91 for twenty-five per cent. of the claim of such creditors, and a demand of an assignment of the claim of such creditor against Griffith & Wundram, and the refusal of such creditor to make such assignment, might have similar actions; nor, as the undersigned supposes, could either party to this paper enforce this paper against the other, excepting by the making, as the case might be, of such tender and demand. This very fact, that to give either of the parties to this paper a remedy against the other, he must make a tender and demand—on the one part a tender of an assignment of the claim against Griffith & Wundram and a demand of the specified notes from Abendroth, and, on the other, tender of the specified notes from Abendroth and a demand of the claims of the creditors against Griffith & Wundram—to the mind of the undersigned conclusively establishes that no property in the claims against Griffith & Wundram passed by the terms of the paper itself. In the judgment of the undersigned, therefore, the claims assigned to Abendroth have been duly proved. They have accordingly been allowed, and on proper notice Abendroth had been duly subrogated to the original claimants (see General Order XXXIV).

It is suggested on the part of the contesting creditors that the provisions of the statute "of limited partnerships" preclude Abendroth from any dividend on these assigned claims until the other creditors shall have been satisfied. In the judgment of the undersigned Abendroth stands, in respect to the assigned claims in his relations with the other creditors of the partnership, in the shoes of his assignors. He is a creditor as their representative and not otherwise. The creditors of the partnership are not any worse off because of his taking these assignments. There is not any reason in law or in justice why they should be any better off.

With respect to the claims of creditors who signed the paper on the 21st November, 1872, the assignments of which were taken by Abendroth subsequently to his appointment as assignee in
92 bankruptcy of the estate he, of the bankrupts, is not to be allowed to make any money on them. The undersigned supposes this to be the sense of the rule on this point.

Whenever the estate in bankruptcy shall be made to pay more than twenty-five cents on the dollar, Abendroth will be bound to distribute the excess of such dividend on these claims *pro rata* among all the creditors of the bankrupts.

The undersigned, upon the whole case, is of the opinion that it does not appear that the claims filed against the bankrupts' estate, for the re-examination of which application was made to him, being the claims which were assigned to William P. Abendroth, assignee in bankruptcy, etc., of the bankrupts, ought to be expunged or diminished, and that as the assignee of these claims the said William P. Abendroth is entitled to reserve and retain the dividend on those claims to his own use.

30th April, 1875.

I. DAYTON, *Register, etc.*

Also concurrence of Judge Blatchford endorsed thereon, dated 13 Nov., 1875.

I concur in the conclusions of the register to the claims above mentioned.

October 13, 1875.

SAM'L BLATCHFORD,
District Judge.

93 Also order of Judge Blatchford therein, dated Oct. 3, 1875, filed Oct. 8, 1877.

At a term of the United States district court for the southern district of New York, held at the court-house, in the city of New York, on the 13th day of October, 1875.

Present: Hon. Samuel Blatchford, judge.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Bankrupts.

It appearing from the report and certificate of Isaac Dayton, Esquire, register in bankruptcy, to whom this matter was duly referred, dated April 30th, 1875, that certain creditors of the bankrupts above named, namely, Joseph McDonald and James McDonald, composing the firm of Joseph McDonald & Co., on the sixth day of August, eighteen hundred and seventy-three, applied by petition to the said register for an order for the re-examination of the following-described claims filed against the estate of the said bankrupts—that is to say:

Names of creditors.	Amounts.	By whom proved.	Date of proof.
Benjamin F. Judson	$9,965 20	B. F. Judson	Dec. 13, 1872.
Holden, Hopkins & Stokes	672 05	E. F. Hopkins	" " "
H. A. Rogers & Company	119 99	W. C. Duyckink	" " "
Lawrence V. Conover	511 35	L. V. Conover	" " "
Spencer, Martin & French	292 26	J. W. French	" " "
Mauret & Weber	1,501 13	A. Weber	" " "
Peck & Wandel	1,123 25	J. C. Wendall	" " "
Edmund Allt	215 06	Edmund Allt	" " "
Rylance & Gaskell	215 99	W. Gaskell	" " "
Salamander G. B. Company	253 47	J. B. Hardenbergh	" " "
R. A. Brick & Co.	272 67	J. A. Robertson	" 18, "
Charles Merrill & Sons	54 89	E. W. Merrill	" " "
The Chalmers Spence Co.	1,200 04	J. Chalmers	" " "
Elias Kimball	284 50	E. Kimball	" " "
Holmes & Lisberger	3,561 09	J. C. Aldrich	" " "
Morris, Tasker & Co.	2,501 00	E. Barr	" " "
Abendroth Bros.	538 80	W. P. Abendroth	" " "
94 C. C. Collier	74 13	C. C. Collier	Dec. 19, 1872.
Fairbanks & Co.	466 99	W. B. Hatch	" " "
C. T. Raynolds & Co.	49 53	S. A. McPhail	" " "
R. H. Hoagland	3,266 09	R. H. Hoagland	" " "
W. C. Allison & Sons	12,967 63	T. E. Allison	" " "
John F. Mills	960 29	J. F. Mills	" 20, "
N. Y. Belting & Packing Co.	105 02	H. Redfield	" " "
A. Schmidt & Bro.	41 84	A. Schmitt	" " "

Names of creditors.	Amounts.	By whom proved.	Date of proof.
George Stump	1,151 10	G. Stump	Dec. 20, 1872.
Heim & Zimmerman	33 81	A. Heim	" " "
Nelson, Finkel & Co.	40 25	E. Finkel	" " "
J. & G. W. Brown	23 00	J. Brown	" " "
Denmead & Son	5,948 28	T. Denmead	" " "
West Side Bank	10,000 00	G. Moore	" " "
Eddy, Cutler & Co.	327 17	G. W. Cutler	" " "
W. J. Schlemmer & Co.	242 34		" " "
Chas. G. Willing	162 25	C. G. Willing	" " "
James J. Richards	63 24	J. J. Richards	" 21, "
A. Wight & Son	399 25	A. Wight, Jr.	" 28, "
W. F. Lawrence	218 46	W. F. Lawrence	Jan. 25, 1873.
F. Stone & Co.	538 11	F. Stone	Feb. 8, "
C. W. Dolle	348 24	C. W. Dolle	" 10, "
Woodward S. P. M'f'g Co.	2,478 80		" 19, "

And it further appearing that said register thereupon made an order fixing the fourteenth day of August, eighteen hundred and seventy-three, as the time for hearing the said petition, and that due notice of the said order and of the said time for hearing the said petition was given by mail to each of the said creditors of the bankrupts, and a second general meeting of the creditors of the said bankrupts having been duly called in accordance with the provisions of the act of Congress known as the bankrupt act, and due notice of such second general meeting of the said creditors having been given to all the creditors of the said bankrupts, as appears by the proof thereof duly filed herein, and the said general meeting of the said creditors having been proceeded with from day to day on the same days with the hearing before the said register of the said petition for the examination of the said claims; and it further appearing that all of said claims (except the claims of Denmead & Son, The West Side Bank, A. Wight & Son, and Abendroth
95 Bros.) were, after being duly proved, duly assigned to William P. Abendroth, the assignee in bankruptcy herein, and that the legal effect of such assignment was made a question by certain creditors on the said hearing; and it further appearing that the said petition was duly heard, and that the said register took the examination of the witnesses called by the respective parties and decided that the said assignments were valid, and that the said claims ought not nor ought any of them to be expunged or diminished, and it having been determined at the second general meeting of the creditors of the said bankrupts that so much of the money belonging to the estate in bankruptcy of the said bankrupts remaining in the hands of said assignee as shall amount to twenty-five per cent. of each claim proved in the said bankruptcy be distributed among the creditors of the said bankrupts, and the said register having thereupon decided that the said William P. Abendroth was and is entitled to receive upon said assigned claims his *pro rata* share of the said dividend of twenty-five per cent., so as aforesaid declared at the said second general meeting of the said creditors upon the claims

aforesaid duly proved against the estate of said bankrupts, and the said decisions of said register having been brought before this court in due form for review, now, on hearing Mr. Amherst Wight in support of said decisions and Mr. C. C. Leeds, for the opposing creditors, it is ordered, decreed, and adjudged that the said William P. Abendroth is entitled to receive and should be paid upon said assigned claims his *pro rata* share of the aforesaid dividend, and that the aforesaid claims ought not nor ought any of them to be expunged or diminished.

Witness the Honorable Samuel Blatchford, judge of the
96 said court, and the seal thereof of the city of New York, this 8th day of October, A. D. 1877.

GEO. F. BETTS, *Clerk.*

(Enter: S. B.)

Also certificate of register as to debts proved, dated 27 January, 1874; filed Jan. 31, 1874.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Bankrupts. No. 3746.

At the office of the register, number 322 Broadway, in the city of New York, in said district, on the twenty-seventh day of January, A. D. 1874.

Before Mr. Isaac Dayton, one of the registers of said district court in bankruptcy.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

I, Isaac Dayton, the register in bankruptcy in charge of the above-entitled bankruptcy, hereby certify that the following is a memorandum showing the names of the creditors of the said bankrupts who have filed depositions for proofs of debts against the said bankrupts and their respective places of residence or their post-office addresses, when stated, and the amounts of their respective debts:

97	Names of creditors.	Places of residence and post-office addresses, when stated.	Amount of debt.
1	William P. Abendroth, assignee, &c.	109 Beekman St., city of New York.	$32,266 25
2	Colwell & Brother	Foot West 27th St., city of New York.	5,622 48
3	George C. Howard	Philadelphia, Penn.	55 00
4	Van Tuyl & Co.	City of New York and 528 Water St., city of New York.	156 35
5	Van Santvoord & Hauff	41 Park Row, city of New York	152 15
6	Denmead & Son	Corner of North and Monument streets, Baltimore, Md.	
7	James H. Holdane & Co.	88 Washington street, city of New York.	4,794 62
8	John W. Quincy	98 William St., city of New York	2,154 82
9	Smith Brothers	Corner of Jay and Plymouth streets, Brooklyn, N. Y.	6,855 17
10	Joseph McDonald & Co.	City of New York	691 93
11	F. O. Ketchum & Co.	5 Cedar street, city of New York	184 53
12	John George	444 West 17th street, city of New York.	38 12
13	Charles W. Durant	94 Wall St., city of New York	4,449 22
14	Martin Gunning	295 10th Ave., city of New York	63 60
15	Hugh McGarry	608 East 16th street, city of New York.	32 18
16	Styles & Cash	95 8th avenue, city of New York	85 39
17	Crane & Clark	Foot of 30th street, New York, N. Y.	664 92
18	John T. Dunkin	552 West 27th street, city of New York.	92 40
19	Higgins & Ostrander	101 West street, city of New York	182 27
20	John J. McCrum	City of New York, and 99 Elm street, city of New York.	1,231 90
21	Joseph Scott	216 West 28th street, city of New York.	106 30
22	Griffith & Marquette	6 West Falls avenue, Baltimore, Md.	59 61
23	William P. Abendroth	City of New York	17,215 69
24	A Faber du Faur	City of New York	90 00
25	B. Kreischer & Son	321 Delancey street, city of New York.	160 99
26	Abendroth Brothers	109 Beekman street, city of New York.	538 80
27	Amherst Wight & Son	119 Broadway, city of New York	399 33
28	The West Side Bank	154 Sixth avenue, city of New York.	10,000 00
29	John H. Beacher	City of New York	89 38
30	William Dolle	64 Freemont street, Greenpoint, Brooklyn, N. Y.	348 24

ISAAC DAYTON,
Register in Bankruptcy.

Endorsed: Filed Jan'y 31, 1874, at 2 p. m.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Firm of Griffith and Wundram, Bankrupts.

(At the office of the register, No. 202 Broadway, in the city of New York, in said district, on the thirtieth day of April, 1875.)

SOUTHERN DISTRICT OF NEW YORK, *ss:*

A List of Debts Proved and Claimed under the Bankruptcy of John Griffith and George W. Wundram, Composing the Firm of Griffith and Wundram, with the First Dividend, at the Rate of Six per cent., This Day Declared Thereon by Mr. Isaac Dayton, One of the Registers in Bankruptcy of said Court.

Number.	Creditors. (To be placed alphabetically, and the names of all the parties to the proof to be carefully set forth.)	Residence and description.	Amount of debt proved, without interest or rebate.	Sums proved or claimed. Claims to be set forth in the same manner after the whole of the proofs.	Dividend.	Bills and securities exhibited. Date of bill or note.	Drawer or maker.	Acceptor.	Indorser.	Sum.
1	William P. Abendroth.....	City and county of New York....	17,215 69	17,159 49	1,029 57	Four promissory notes made by the said Griffith and Wundram, all dated 31st December, 1870..... $16,000 00 Account ..... 158 00 Interest 1,057 69 $17,215 69	.....	.....	.....	1,029 57
2	Abendroth Brothers, proved by Wm. P. Abendroth, partner.	City and county of New York.....	538 80	566 01	33 96	Account.....	.....	.....	.....	33 96
38	Joseph McDonald & Co., proved by Joseph McDonald, partner.	City and county of New York.....	691 93	688 29	41 30	Two promissory notes made by said Griffith and Wundram— One dated July 30, 1872.... $471 02 One dated October 18, 1872..... 220 91 $691 93	.....	.....	.....	41 30

Here follows list of statement of various other creditors.

ISAAC DAYTON, *Register in Bankruptcy.*

99 Also order of the register as to dividend to be paid, dated April 30, 1875.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Copartnership of Griffith & Wundram, Bankrupts. No. 3746.

At the office of the register, number 322 Broadway, in the city of New York, in the southern district of New York, on the — day of ——, A. D. 187–, before Mr. Isaac Dayton, one of the registers in bankruptcy of said court.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The undersigned, creditors of John Griffith and George W. Wundram, composing the copartnership of Griffith & Wundram, the bankrupts above named, acknowledge that they have respectively received from William P. Abendroth, the assignee in bankruptcy of the estate and effects of the said bankrupts, the respective sums set opposite to our several signatures hereto, in full for the first dividend out of the estate in bankruptcy of the said bankrupts.
Dated November, 1875.

Here follow names of various creditors, including the following:

100	Amounts.
Joseph McDonald & Co.	$41 30
Abendroth Bros.	33 96
W. P. Abendroth, by L T. Lehmeyer	1,029 57

Also list of debts, as certified to by the register.

List of Proofs and Claims for Dividend.

In the District Court of the United States for the Southern District of New York. In Bankruptcy.

In the Matter of JOHN GRIFFITH and GEORGE W. WUNDRAM, Composing the Firm of Griffith & Wundram, Bankrupts.

At the office of Isaac Dayton, register, at number 322 Broadway, in the city of New York, in said district, on the — day of ——, A. D. 187–.

A list of debts proved and claimed under the bankruptcy of John Griffith and George W. Wundram, composing the firm of Griffith & Wundram aforesaid, with the first dividend at the rate of six per cent. this day declared thereon by Mr. Isaac Dayton, one of the registers in bankruptcy of said district court:

Number.	101 CREDITORS. To be placed alphabetically, and the names of all parties to the proof to be carefully set forth.	Amount of debt proved without interest or rebate.	SUMS PROVED. The claims to be set forth in the same manner at the end of the whole of the proofs.	Dividend.
1	William P. Abendroth	17,215 69	17,159 49	1,029 57
2	Abendroth Brothers	538 80	560 01	33 96

Here follow various others.

Mr. Fiske moved to amend the answer so as to conform to the third defense set up in the case of Durant *v.* Abendroth. Motion granted. The defense is as follows:

Third.

1. That on the twenty-third day of November, A. D. 1872, George W. Wundram and John Griffith were partners, trading and doing business in the city of New York, under the name, style, and firm of Griffith & Wundram, and that said Griffith & Wundram were the general partners in said firm, and this defendant, William P. Abendroth, was a special partner therein.

2. That on said twenty-third day of November, 1872, and for six months next immediately preceding that time, the said George W. Wundram and John Griffith had resided in the city of New York, in the county and State of New York, within the jurisdiction of the United States, within the jurisdiction of the district court of the United States for the southern district of New York, and at and for said time the said copartnership of Griffith & Wundram carried on business at the city of New York, in said district, and that they were then and there entitled to the benefit of the act of Con-
102 gress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and of the acts supplementary thereto and amendatory thereof, and that they then and there, as partners aforesaid, did owe debts provable in bankruptcy exceeding the amount of three hundred dollars, which had not been created by fraud or embezzlement or by their defalcation as public officers, or while acting in any fiduciary capacity, and that they were unable to pay all their debts in full, and that they were willing to surrender all their estate and effects for the benefit of their creditors.

3. The said George W. Wundram, on said twenty-third day of November, 1872, filed his petition in bankruptcy, setting forth that said John Griffith was unwilling to join in said petition, and that said Griffith was temporarily absent from the city of New York and was then at the city of Liverpool, England; that the said Griffith

and Wundram owed copartnership debts exceeding the amount of three hundred dollars, which they were jointly and severally unable to pay in full; that he was willing to surrender all his estate and effects for the benefit of his creditors, and desired to obtain a discharge from his debts; and there was annexed to said petition a schedule, marked "A," which contained a full and true statement of all the debts of said copartnership, and, as far as possible the names and places of residence of their creditors and the amount due to each; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral, or other security given for the payment of the same; also a schedule, marked "B," containing an accurate inventory of the estate of said partnership, including both real and personal their rights, credits of
103 every name, kind, and description, and the location and situation of each and every parcel and portion thereof, which said petition and schedules were duly verified by the oath of said George W. Wundram; and the said Wundram did then and there apply to the said district court of the United States for the said southern district of New York, the said court then being held at the city of New York, in the said district and State of New York, before the Hon. Samuel Blatchford, district judge of the United States for the southern district of New York, and who then and there had full power and lawful authority to hold said court by virtue of the said act of Congress; and the said George W. Wundram did in said petition declare that he and the said John Griffith were unable to pay said partnership debts in full, and prayed that they, the said Griffith and Wundram, might be declared bankrupts pursuant to the directions of said act, and that, the said petition being then and there received and filed by the said district court of the United States for the southern district of New York, such proceedings were had thereon, to which plaintiffs and defendant were parties, that it was duly adjudged and determined in and by said court that said John Griffith and George W. Wundram, the bankrupts in said bankruptcy proceedings, were the general partners in the limited partnership of Griffith & Wundram, and that this defendant, William P. Abendroth, was the special partner therein, and that said firm of Griffith & Wundram was bankrupt.

4. That in the course of said proceedings in bankruptcy a meeting of the creditors of said special partnership of Griffith & Wundram was duly held, whereat this defendant was duly chosen the assignee in bankruptcy of said firm, and thereafter he duly qualified as such and entered upon and discharged the duties of said office.

5. That the said adjudication that Griffith & Wundram were general partners and the defendant was special partner was
104 made more than two years before the commencement of this action, and the same now remains in full force and effect.

6. That the supposed indebtedness alleged in the complaint, if any such ever did accrue, accrued before the commencement of said

proceedings in bankruptcy, and such indebtedness, if any existed, was one that was provable in bankruptcy and was not, nor was any part thereof, created by fraud or embezzlement or by the defalcation of said Griffith and Wundram or either of them, as public officers, or while acting in any fiduciary capacity.

7. That this defendant pleads the said proceedings in bankruptcy and each and every part thereof and the adjudications and determinations therein and the acts of the assignors of plaintiffs in connection therewith in bar and abatement of this action.

Defendant rests.

Plaintiff reads in evidence the following endorsement of Judge Blatchford on certified copy of petition of Wundram for adjudication in bankruptcy and for order to show cause produced by defendant, filed Nov. 30, 1872, and being Defendant's Ex. No. 3:

"Enter order of adjudication as to petitioner and Griffith, reciting facts, Nov. 30, 1872—S. B."

SAMUEL BLATCHFORD, called for plaintiff and examined by Mr. NORWOOD, testified:

Q. (Adjudication in bankruptcy of Griffith & Wundram shown witness.) Was Wm. P. Abenroth before you in person or by counsel at the time of that adjudication?

A. I have no recollection of the subject, except what is shown by the papers consisting of the petition, order to show cause, proof of service, and adjudication.

105 Q. After examining these papers and your record then made, can you answer the previous question?

A. The memoranda on the blotter, under date of Saturday, Nov. 30, 1872, which is a blotter containing the proceedings in court before me, on that day, on the return of the orders to show cause, an involuntary petition, and written by me on that day, is as follows: "Proof of service; Griffith called; enter order of adjudication by default, reciting facts." This is entered opposite the following title: "In the matter of George W. Wundram, for himself and against John Griffith." Mortimer C. Addoms was named as attorney for the petitioner. On the back of the certified copy of petition to show cause and proof of service is this endorsement in my handwriting, which was made by me on its date: "Enter order of adjudication as to petitioner and Griffith, reciting facts, Nov. 30, 1872.—S. B." I know that these entries are true from my course of business; beyond that I have no recollection of the transaction.

Q. Can you, from these papers, entries, and the course of business, state whether the question of Mr. Abendroth's relation to the firm of Griffith & Wundram was presented to you at that time?

A. Nothing was brought before me except what appears on the face of the papers; the name of Mr. Abendroth was not mentioned in the papers, except as it appears in schedules, and from those papers I can say that he did not appear personally or by counsel.

Q. Did you ever, in these proceedings, pass upon the question of

whether Abendroth was or was not a member of the firm of Griffith & Wundram?

A. The only answer I can make to that question is that if the adjudication in bankruptcy in the petition was in law a passing on the question referred to, then I did pass on it, and that otherwise I did not pass on it.

Q. By your last answer do you mean that you did not pass
106 upon the question in fact, but that the adjudication may be construed as a passing on it in law?

A. I mean that I did not pass on it in fact otherwise than as the said papers show; if they show in law that I passed upon it in fact, then I did. I do not see that I can make any other answer to that question.

Q. Was any question affecting Mr. Abendroth's relation to the firm passed upon by you otherwise than as appears by the face of the papers shown you?

A. It was not.

Q. I direct your attention to the order filed October 8, 1877, and the report of Register Dayton, and the proceedings on which that order was based. Did you, on that proceeding, pass upon the question of whether Mr. Abendroth was or was not a member of the firm of Griffith & Wundram?

A. In so far as the question asked me is a question of law I do not answer it; in so far as it asks whether as a matter of fact I passed on the question of the membership of Mr. Abendroth in the firm, I can state, as a matter of recollection, that I did not pass on any questions discussed in the report of the register, except his conclusions that the claim of Mr. Abendroth ought not to be expunged or diminished, and that he was entitled to the dividends on them, and that I concurred in his conclusion; this is shown by the papers referred to; if by so doing I, in law, passed as a matter of fact on the said questions and on the question of the membership of Abendroth in the firm, then I did pass on them as a matter of fact; I did not otherwise pass on them as a matter of fact.

Cross-examined by Mr. FISKE:

Q. Upon the papers submitted to you, to which you have referred, did it not appear, as a matter of fact, that John Griffith and George W. Wundram alone composed the firm of Griffith & Wun-
107 dram, and that the only relation the defendant, Wm. P. Abendroth, bore to the said firm of Griffith & Wundram, was that of a creditor?

A. Upon the petition and schedules it appeared that said firm consisted of said Griffith and said Wundram, and it did not appear that any other person was a member of said firm, and nothing appeared affirmatively in regard to said Abendroth, except that he was a creditor of said firm.

Plaintiff rested and testimony closed.

Mr. Fiske moved for a direction to the jury to find a verdict for the defendant Abendroth upon all the evidence.

Motion denied and defendant excepted.

Mr. Norwood moved for a direction to find verdict for the plaintiffs and against the defendant Abendroth.

The chief justice thereupon delivered the following opinion:

N. Y. Marine Court. Trial Term, June, 1882.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT
against
WILLIAM P. ABENDROTH, Impleaded, &c.

MCADAM, *J.:*

The plaintiffs sue to recover $900.32, the amount of a past due promissory note, made by a copartnership firm doing business under the name and style of "Griffith & Wundram."

The evidence shows that the three defendants formed a
108 limited partnership under the statutes of this State (2 R. S., 6th ed., 1153), in which Griffith & Wundram were the general partners and the defendant Abendroth the special.

They complied with all the formal requirements of the statute in regard to signing, acknowledging, filing, and publishing the certificate provided for therein, as well as the requirement that an affidavit shall be filed proving that the sum contributed by the special partner to the common stock had been actually and in good faith paid in cash, so that upon the face of the record a limited partnership was effectually consummated between the parties upon the terms and conditions specified in the articles and in said certificate.

But the statute (2 R. S., 6th ed., 1154, § 8) contains a specific provision for the benefit of creditors in these words: "And if any false statement be made in such certificate or affidavit all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." It does not make the persons interested general partners. This it could not do—that is to say, the statutes could not alter the rights and equities of the partners as between themselves; these were fixed by the contract obligations of the parties; nor did the statute make them general partners as to third persons. It did not intend to misdescribe their legal relation. If the defendants had failed to file the certificate and affidavit required by the statute they would have become general partners, because it is specially provided "that no limited partnership shall be deemed to have been formed" until this requirement is complied with (2 R. S., 6th ed., 1154, § 8); but when this formality is complied with the limited partnership is complete, with all the incidents belonging to such a relation, and the partnership thus formed continues until legally dissolved; but if the certificate and affidavit prove to be false, the statute declares that all persons interested in the firm shall be liable as general partners for all of the firm's
109 engagements. If the firm keeps its engagements the limited partnership and the rights and obligations of the parties continue as before. If it fails to keep its engagements the legal relation is left unchanged, but the persons in interest, whether as general

or special partners, are made liable for such unperformed engagements, so that, while not general partners in fact nor made such by statute, they may nevertheless be holden as if they were by creditors holding the firm's obligations. A well-defined legal distinction exists between general partners *inter se* and persons who, without occupying the legal relation, become after proof of misconduct holden to the same liability as those who do.

The proofs show that the certificate and affidavit were false in this, that, instead of contributing his share of the capital in cash, Abendroth, the special partner, contributed a check which was neither paid nor credited to the firm for several days afterwards.

This circumstance made all of the defendants liable for the firm's engagements (Durand *vs.* Abendroth, 69 N. Y., 148), while liable in form as general partners; this liability, imposed as a sort of penalty, did not, as before remarked, alter the fact that as between themselves they were just what they contracted to be, to wit, "Griffith & Wundram" were the general partners and Abendroth the special. The general partners, as a firm, became bankrupt, and on the petition of Wundram it was formally adjudicated bankrupt on the 30th day of November, 1872, and on the 20th day of December following Abendroth was chosen assignee of the firm's estate. It was a proceeding between Griffith and Wundram, the general partners, on the one hand, and the firm's creditors on the other, and it was to this extent only that the bankruptcy court obtained jurisdiction over the subject-matter and parties. Abendroth was not a party except as a creditor. No one pretended or alleged that he (Abendroth) was bankrupt or that the firm, if Abendroth had been included as general partner, would have been bankrupt, and the bankruptcy court obtained jurisdiction over Abendroth as a creditor only, and could deal with him in no other right or capacity. The adjudication and what followed affected Griffith & Wundram as bankrupts, on the one hand, and Abendroth and the other persons mentioned in the schedules as creditors, on the other.

The bankruptcy court did not and could not have adjudicated the question whether Abendroth had incurred the liability imposed by the statute before cited. That question was not before the bankruptcy court, and did not belong there for adjudication.

The determination of the question of the bankruptcy of Griffith & Wundram and the administration of their estate did not directly or indirectly involve the question to be determined here, *i. e.*, whether Abendroth, a creditor in the bankruptcy proceedings, was liable under the statute to the plaintiffs, who were also creditors there, for the debt owing by the bankrupt firm. Bankruptcy proceedings were not designed to settle disputed claims which one creditor of a bankrupt firm may have against another creditor of the same firm, for the jurisdiction of the bankruptcy court is limited to the determination of the claims which the creditors present against the bankrupt estate.

The plaintiffs herein never proved their claim and never accepted any dividend from the assigned estate, and they have in no way, directly or indirectly, by influence or otherwise, done any act or

thing which can be construed into a waiver of their right to enforce the statutory liability of Abendroth.

The record in the bankruptcy court was truthful in point of fact, and this is all that it implies. The parties were correctly described—that is to say, in speaking of them in the proceedings subsequent to the adjudication "Griffith & Wundram" were called the
111 "general partners" and "Abendroth" the special. There was no impropriety in applying these terms to the defendants, nor does their use add any legal force to the contention that the plaintiffs' demand here was adjudicated there. If Griffith & Wundram had brought an action as a firm, Abendroth could not have been joined as a plaintiff. (Schultur *v.* Lord, 4 E. D. Smith, 206; 2 R. S., 6th ed., p. 1156, § 14.)

He was certainly not a necessary party, at all events. Upon the entire case I hold and decide that the bankruptcy proceedings are not a bar to this action; that the issue determined here was not and could not have been adjudicated there, and that the bankruptcy proceedings have no relevancy to the questions introduced in the present litigation.

It follows that the plaintiffs are entitled to judgment for $1,482.15, the amount claimed, and interest.

Motion granted and defendant excepted.

The jury thereupon, under the direction, rendered a verdict in favor of the plaintiffs and against the defendant, Abendroth, for the sum of $1,482.15.

Defendant excepted.

112 At a general term of the city court of New York held at the City Hall, in the city of New York, on the 30th day of November, 1885.

Present: Hon. Charles J. Nehrbas, Hon. S. Burdett Hyatt, JJ.

ABRAHAM VAN DOLSEN & WILLIAM H. ARNOTT, Pl'ffs & Respo'ts,

vs.

WILLIAM P. ABENDROTH, Impleaded, *et al.*, Def't-. & Appel't-.

The defendant, William P. Abendroth, having appealed to the general term of this court from the judgment entered herein in the above-entitled action in the office of the clerk of the city court of New York on the twelfth day of January, 1883, in favor of the plaintiff and against the defendant, William P. Abendroth, for the sum of two thousand and twenty-three $\frac{37}{100}$ dollars, and the
113 same duly coming on to be heard on the second day of October, 1885, and after hearing William H. Arnoux, Esq., of counsel for appellant, and Carlisle Norwood, Jr., of counsel for the respondents, it is, on motion of Norwood & Coggeshall, attorneys for the respondents—

Ordered that the said judgment so appealed from be, and the same hereby is, in all things affirmed, with costs to the respondents.

Enter.

S. B. H., *J. C. C.*

114 [Endorsed:] City court of New York, general term. Abraham Van Dolsen *et al.* against William P. Abendroth *et al.* Order affirming judgment. Norwood & Coggeshall, attorneys for pl'ffs, Morse building, 140 Nassau street, New York. To Messrs. Arnoux, Ritch & Woodford, def'ts' att'ys, 18 Wall St., N. Y. city.

GENTLEMEN: Please take notice that the within is a copy of an order this day duly made and entered herein in the office of the clerk of the city court of New York, at his office in the City Hall, in said city.

Dated New York, November 30th, 1885.

Yours, &c., NORWOOD & COGGESHALL,
Pl'ffs' Att'ys, 140 *Nassau St., N. Y. City.*

To Mess. Arnoux, Ritch & Woodford, def'ts' att'ys, 18 Wall St., N. Y. city.

115 *Judgment.*

City Court of New York.

ABRAHAM VAN DOLSEN & WILLIAM H. ARNOTT, Plaintiffs,
ag'st
WILLIAM P. ABENDROTH, Impleaded, *et al.*, Defendants.

The appeal of the defendant, William P. Abendroth, in the above-entitled action having been duly heard and an order of the general term of this court having been duly entered herein on the thirtieth day of November, 1885, affirming the judgment entered herein on the twelfth day of January, 1883, in favor of the plaintiffs and against the defendant, William P. Abendroth, with the costs to the respondents, it is, on motion of Norwood & Coggeshall, attorneys for said plaintiffs and respondents—

Ordered that the judgment entered herein on the twelfth day of January, 1883, in favor of the plaintiffs and against the defendant,

116 William P. Abendroth, for the sum of two thousand and twenty-three $\frac{27}{100}$ dollars ($2,023.27) be, and the same hereby is, in all things affirmed, and that the plaintiffs, Abraham Van Dolsen and William H. Arnott, recover of the defendant, William P. Abendroth, the sum of seventy $\frac{00}{100}$ dollars costs, besides nineteen $\frac{69}{100}$ dollars disbursements, amounting in all to the sum of eighty-nine $\frac{69}{100}$ dollars, and that plaintiff- have execution therefor.

Dated November 30, 1885.

(S'g'd) JOHN REID, *Clerk.*

117 [Endorsed]: City court of New York. Abraham Van Dolsen *et al.* against William P. Abendroth *et al.* Judgment. Norwood & Coggeshall, attorneys for pl'ffs, Morse building, 140 Nassau street, New York. To Arnoux, Ritch & Woodford, def'ts' att'ys, 18 Wall St., N. Y. city.

GENTLEMEN: Please take notice that the within is a copy of a judgment this day duly made & entered herein in the office of the clerk of the city court of New York, at his office in the City Hall, in said city.

Dated New York, November 30th, 1885.

Yours, &c., NORWOOD & COGGESHALL,
Pl'ffs' Att'y-, 140 Nassau St., N. Y. City.

To Mess. Arnoux, Ritch & Woodford, def'ts' att'ys, 18 Wall St., N. Y. city.

118 City Court of New York.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Respondents,
against
WILLIAM P. ABENDROTH, Impleaded, &c., Appellant.

GENTLEMEN: Take notice that the above-named defendant hereby appeals to the general term of the court of common pleas for the city and county of New York from the judgment entered in this action in this court on the 30th day of November, 1885, affirming the judgment theretofore entered in this action on the 12th day of January, 1883, in favor of said plaintiffs and against said defendant for the sum of $2,023.27 and from each and every part of said judgment of affirmance.

New York, Nov. 30, 1885.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant, 18 Wall Street, New York City.

To Norwood & Coggeshall, Esqs., attorneys for plaintiffs; John Reid, Esq., clerk.

119 N. Y. City Court. General Term.

ABRAHAM VAN DOLSEN & Ano., Respondents,
vs.
WILLIAM P. ABENDROTH, Appellant.

Heard by Nehrbas & Hyatt, JJ.

Appeal from a judgment entered upon a verdict directed in favor of plaintiff.

Arnoux, Ritch & Woodford, for appellant; Wm. H. Arnoux, of counsel; Norwood & Coggeshall, for respondents; Carlisle Norwood, Jr., of counsel.

NEHRBAS, *J.:*

By the decision of the court of appeals the main points relied on by the appellant have been decided adversely to him. He now claims that the direction was erroneous because the plaintiffs have failed to prove the allegations of partnership set up in the com-

plaint; but this question has also been disposed of by the general term of the supreme court, first department, in the case
120 of Durant *vs.* Abendroth, March, 1885; not yet reported.

We concur in the views of the supreme court on that subject. Further discussion is therefore unnecessary.

Judgment affirmed with costs.

Endorsed: "I concur. S. B. H., J."

121 *Return to Common Pleas on Appeal from Judgment of City Court, General Term.*

City Court of New York.

ABRAHAM VAN DOLSEN *et al.*
against
WILLIAM P. ABENDROTH, Impleaded, &c.

The city court of New York, pursuant to the statute regulating appeals from judgments of the said city court, rendered at a general term thereof, to the court of common pleas for the city and county of New York, do hereby return to the said court of common pleas that the proceedings prior to the trial testimony taken thereat and judgment rendered thereon in the said city court and the appeal taken therefrom to the general term of said court appear in and by the printed case on appeal annexed hereto and forming part of this return. The appeal so taken was argued at the general term of said court, and the judgment rendered at the trial term was affirmed with costs, as more fully appears by the order of said general term hereto annexed and forming part of this return, on which order judgment was in due form entered, and an appeal was thereafter taken to the court of common pleas in and for the city and county of New York, and the notice of appeal is also annexed hereto and forms part of this return, and that the matters and things aforesaid comprise all the proceedings in the said city court; all of which is respectfully submitted.

New York, Dec. 10th, A. D. 1885.

By the court:

[Seal City Court of New York.]

JOHN REID, *Clerk.*

Record of the general term:

Vote for affirmance, two.
Vote for reversal, none.
Opinion filed. (Nehrbas), J.

[Seal City Court of New York.]

JOHN REID, *Clerk.*

122 [Endorsed:] City court of New York. Abraham Van Dolsen *et al.* against William P. Abendroth, imp. Return from the city court. John Reid, clerk. Filed Dec. 10, 1885. N. Jarvis, Jr., c'k.

123 [Endorsed:] N. Y. city court. Ab'm Van Dolsen *et al.* against Wm. P. Abendroth. Remittitur from common pleas. Norwood & Coggeshall, attorneys for pl'ffs, Morse building, 140 Nassau street, New York. Carlisle Norwood, Jr., Edwin W. Coggeshall.

124 At a special term of the city court of New York, held at the city hall, in the city of New York, on the eighth day of January, 1886.

Present: Hon. Simon M. Ehrlich, justice.

ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Plaintiffs,
ag'st
WILLIAM P. ABENDROTH, Impl'd, Defendant.

On reading and filing the remittitur of the court of common pleas for the city and county of New York, dated January 8th, 1886, and the judgment of said court therein contained, whereby it was, by said court of common pleas for the city and county of New York, ordered and adjudged that the judgment of the general term of the city court of New York be affirmed with costs to respondents, it is,

125 on motion of Norwood and Coggeshall, attorneys for the plaintiffs and respondents herein, ordered and adjudged that the judgment of the court of common pleas for the city and county of New York contained in said remittitur be, and the same hereby is, made the judgment of this court, and that the judgment entered in this action upon the determination of the general term of the city court of New York in favor of the plaintiffs and against the defendant, William P. Abendroth, on November 30th, 1885, for the sum of eighty-nine $\frac{69}{100}$ dollars costs and disbursements and affirming the judgment theretofore rendered in favor of the plaintiff and against the defendant, William P. Abendroth, for the sum of $2,023.27 and duly entered in the office of the clerk of this court on January 17th, 1883, be, and the said judgment hereby is, in all things affirmed.

It is further ordered that Abraham Van Dolsen and William H. Arnott, the plaintiffs and respondents herein, recover against William P. Abendroth, the defendant and appellant herein, the sum of sixty dollars costs and five $\frac{46}{100}$ dollars disbursements, amounting in all to the sum of sixty-five $\frac{46}{100}$ dollars; said costs to be taxed by the clerk of this court and to be inserted herein.

Ent.

S. M. E.

126 [Endorsed:] City court of New York. Ab'm Van Dolsen *et al.* against William P. Abendroth, impl'd. Order on remittitur from court of common pleas. Norwood & Coggeshall, attorneys for pl'ffs, Morse building, 140 Nassau street, New York.

127 *Bill of Costs.*

City Court of New York.

ABRAHAM VAN DOLSEN *et al.*, Plaintiffs,
against
WILLIAM P. ABENDROTH, Impl'd, Defendant.

Costs:

Proceedings before notice of trial		
Additional defendants served not exceeding ten		
" " " in excess of ten		
Proceedings after notice and before trial		
Motion		
Term fees		
Trial fee, issue of law		
" " fact		
Additional fee, trial more than two days		
Allowance by statute		
" " court		
Attending examination of party before trial		
" and taking deposition conditionally		
Drawing interrogatories to annex to commission		
Attending to perpetuate testimony		
Procuring injunction		
" order of arrest		
Appointment of guardian of infant defendant		
Applica'n for judg't on special verd't before argument		
" " " " " for "		
" for new trial on case made before "		
" for " " " for "		
Proceedings after granting and before new trial		
Making and serving case		
Add. for case containing more than fifty folios		
Making and serving amendments to case		
On appeal to general term before argument		20
" to " for "		40
App. on judg't on verdict subj't to opin. bef. argum't		
" " " " " for "		
Exceptions to be heard at gen. term before argument		
" " " " for "		
Term fees at general term		
Preparing case on appeal to court of appeals		
On appeal to court of appeals before argument		
" " " for "		
Term fees in court of appeals		
	60	
	5	46
Total costs	65	46

Disbursements:

Searches	
Filing *lis pendens*	
Filing following papers	
Serving summons	
Publication of summons	
Affidavits and acknowledgments	12
Copies summons, complaint, notice of object	
Certified copies orders gen'l term	10
Postage	
Filing note of issue	
Commissioner's fees	
Term fees	
Referee's fees	
Trial fee	
Jury fee	
Stenographer's fees	
Extract from minutes	
Entering judgment	10
Certified copy judgment	1 00
Transcript and filing	12
Satisfaction piece	25
Execution	72
Attachment	
Printing cases at general term	
" points at " "	2 55
" case in court of appeals	
" points in court of appeals	
Remittitur	
Copies of following papers	
Attendance of following witnesses	
Remittitur	50
	5 46
Disbursements	
Costs	
Total	

Costs taxed at 65.46.

J. R., *Clk.*

Please take notice that the foregoing bill of costs will be presented to the clerk of this court, at his office, in the court-house, in the city and county of New York, on the 8 day of January, 1886, at 2 o'clock afternoon, for adjustment and insertion of the sum thereof in the entry of judgment herein.

Dated New York city, the 8 day of January, 1886.

Yours, &c., NORWOOD & COGGESHALL,
Attorneys for Pl'ffs.

To Arnoux, Ritch & Woodford, Esqs., attorneys for —.

128 We hereby consent that the within bill of costs be taxed at $65.46.

N. Y., Jan. 8, '86.

ARNOUX, RITCH & WOODFORD,
Att'ys for Def't.

[Endorsed:] City court of New York. Abraham Van Dolsen *et al.* against William P. Abendroth, im. Bill of costs and notice of adjustment. Norwood & Coggeshall, attorneys for the pl'ffs, 140 Nassau —, New York city. Due and timely service of the within bill of costs and notice of adjustment is hereby admitted. Dated New York city, the — day of ——, 18—. —— ——, attorney for —.

CITY AND COUNTY OF NEW YORK, *ss:*

Gustavus W. Rawson, a clerk in office of the attorneys for the plaintiffs in the above-entitled action, being duly sworn, says that the aforegoing disbursements have been or may be necessarily made or incurred herein.

GUSTAVUS W. RAWSON.

Sworn before me this 8 day of January, 1886.

CHAS. H. DILLEY,
Notary Public (48), *N. Y. Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

——— ——, being duly sworn, says that on — day of ——, 18—, at ——, county of ——, he served the foregoing bill of costs and notice upon —— ——, attorney for the ——, by delivering to and leaving with ——.

129 *Judgment, Jan'y* 8, 1886.

City Court of New York.

ABRAHAM VAN DOLSEN & WILLIAM H. ARNOTT, Plaintiffs,
vs.
WILLIAM P. ABENDROTH, Impl'd, Defendant.

The appeal of the defendant, William P. Abendroth, in the above-entitled action to the court of common pleas for the city and county of New York having been duly heard, and an order of the general term of said court having been duly entered therein, on the seventh day of January, 1886, affirming the judgment entered in this action, in the city court of New York, on the thirtieth day of November, 1885, affirming a judgment theretofore entered in this action on the twelfth day of January, 1883, in favor of said plaintiff and against said defendant, William P. Abendroth, for the sum of two thousand and twenty-three $\frac{37}{100}$ dollars, with costs to the plaintiffs and respondents, and the remittitur in the above-entitled action from the court of common pleas for the city and county of New York
130 filed herein, and an order entered thereon on January 8th, 1886, making the judgment contained in said remittitur the judgment of this court—

It is, on motion of Norwood & Coggeshall, attorneys for the plaintiffs herein—

Ordered that Abraham Van Dolsen and William H. Arnott, plaintiffs herein, recover judgment against the defendant, William P. Abendroth, for the sum of sixty dollars costs and five $\frac{46}{100}$ dollars disbursements, amounting in all to the sum of sixty-five $\frac{46}{100}$ dollars, and that said plaintiff have execution therefor.

Dated New York, January 8, 1886.

JOHN REID, *Clerk.*

131 [Endorsed:] City court of New York. Abraham Van Dolsen *et al.* against William P. Abendroth, impl'd. Judgment. Norwood & Coggeshall, attorneys for pl'ffs, Morse building, 140 Nassau street, New York. Filed Jan'y 8, 1886, at 2.30.

132 Court of Common Pleas for the City and County of New York.

ABRAHAM VAN DOLSEN and Another, Respondents,
against
WILLIAM P. ABENDROTH, Impleaded, etc., Appellant.

GENTLEMEN: Take notice that upon the return from the city court of New York and upon all the papers pleadings. and proceedings herein we shall move this court, at a general term thereof to be held at the county court-house, New York city, on the 11th day of January, 1886, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, for an order granting defendant leave to appeal the above action to the court of appeals and for such other and further relief as may be just.

Dated New York, January 9th, 1886.

ARNOUX, RITCH & WOODFORD,
Attorneys for Defendant, 18 *Wall St., N. Y. City.*

To Messrs. Norwood & Coggeshall, attorneys for plaintiffs.

133 At a general term of the court of common pleas for the city and county of New York, held at the county court-house, in the city of New York, on the first day of February, 1886.

Present: Hon. Richard L. Larremore, C. J.; Hon. Henry Wilder Allen, J.; Hon. Henry W. Bookstaver, J.

ABRAHAM VAN DOLSEN *et al.*, Plaintiffs,
vs.
WILLIAM P. ABENDROTH, Impl'd, Defendant.

On reading and filing the defendant's notice of motion for leave to appeal the above action to the court of appeals, dated January 9th, 1886, and on reading the return from the city court of New York in above action, and all the papers and pleadings herein and on all the proceedings herein, and after hearing Arnoux, Ritch & Woodford, attorneys for the above-named defendant, in favor of said

motion and Carlisle Norwood, Jr., of counsel for plaintiffs, in opposition thereto, it is, on motion of Norwood & Coggeshall, attorneys for plaintiff—

Ordered that said motion be, and the same hereby is, de-
134 nied, and the defendant, William P. Abendroth, is hereby denied leave to appeal the above action to the court of appeals.

It is further ordered that plaintiffs have ten dollars costs of the motion herein.

Enter.

H. W. BOOKSTAVER, *J. C. P.*

135 CITY AND COUNTY OF NEW YORK, *ss:*

City Court of New York.

ABRAHAM VAN DOLSEN and Ano.
against
WILLIAM P. ABENDROTH, Impleaded, etc.

Thomas G. Ritch, being duly sworn, says that he is one of the attorneys for the defendant herein; that the general term of the court of common pleas in affirming the judgment on the appeal to said court did not write any opinion.

THOS. G. RITCH.

Sworn to before me this 16th day of February, 1886.
[Seal David F. Butcher, Notary Public, Kings County.]

DAVID F. BUTCHER,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

136 Supreme Court of the United States.

WILLIAM P. ABENDROTH, Plaintiff in Error,
against
ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Defendants in Error.

Afterwards, to wit, on this 12th day of February, 1886, in this said term, before the Supreme Court of the United States, at the Capitol in the city of Washington, comes William P. Abendroth, plaintiff in error, by Arnoux, Ritch & Woodford, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, for that the judgment in said action was entered for the plaintiffs, while in law said judgment should have been entered for said defendant, and for that the trial court directed a verdict for said plaintiffs, while in law said trial court should have directed a verdict for the said defendant, and for that the judgment in said action was contrary to law, and this the said William P. Abendroth, by his attorneys, is ready to verify; wherefore he prays that the judgment aforesaid for the errors may be revoked, annulled,

and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the judgment aforesaid.

ARNOUX, RITCH & WOODFORD,
Attorneys for Wm. P. Abendroth, Plaintiff in Error.

137 [Endorsed:] U. S. Supreme Court. William P. Abendroth, plaintiff in error, against Abraham Van Dolson & ano., defendants in error. Assignment of errors. Arnoux, Ritch & Woodford, attorneys for plaintiff in error, 18 Wall street, New York city. Service of copy of within is hereby admitted. New York, February 12, 1886. Norwood & Coggeshall, def'ts' att'ys.

138 *Bond for Damages and Costs.*

Supreme Court of the United States of America.

WILLIAM P. ABENDROTH, Impleaded, etc.,
vs.
ABRAHAM VAN DOLSON and WILLIAM H. ARNOTT.

Know all men by these presents that we, William P. Abendroth and Nicholas L. Cort, of No. 67 West 48th —, city of New York, State of New York, and Louis T. Lehmeyer, of No. 521 East 84th street, city of New York, State of New York, are held and firmly bound unto the above-named Abraham Van Dolsen and William H. Arnott in the sum of twenty-five hundred (2,500) dollars, to be paid to the said Van Dolsen and Arnott; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the eighth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-named William P. Abendroth hath prosecuted a writ of error to the Supreme Court of the United States, directed to the city court of New York, in the city of New York, State of New York, to reverse the judgment rendered in the above-entitled suit — the said city court of the city of New York:

Now, therefore, the condition of this obligation is such that if the above-named William P. Abendroth shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WILLIAM P. ABENDROTH. [SEAL.]
NICHOLAS L. CORT. [SEAL.]
LOUIS T. LEHMEYER. [SEAL.]

Sealed and delivered and taken and acknowledged this 8th day of February, 1886, before me—

[Seal John A. Shields, United States Commissioner, Southern District N. Y.]

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

[Endorsed:] U. S. Supreme Court. William P. Abendroth, impleaded, etc., *vs.* Abraham Van Dolsen & ano. Bond for damages and costs on writ of error. Arnoux, Ritch & Woodford, proctors, 18 Wall street, N. Y. The within bond for the purpose of supersedeas is hereby approved this 9th day of Feb.; 1886. M. R. Waite, Chief Justice S. C. Service — copy — within hereby admitted. N. Y., Feb. 12, '86. Norwood & Coggeshall, def't- att'ys.

139 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Nicholas L. Cort, of No. 67 West 48th street, city of New York, State of New York, and Louis T. Lehmeyer, of No. 521 East 84th street, city of New York, State of New York, being duly sworn, do depose and say and each for himself saith that he is worth the sum of five thousand dollars over and above all his just debts and liabilities.

NICHOLAS L. CORT.
LOUIS T. LEHMEYER.

Sworn to this 8th day of Feb'y, A. D. 1886, before me—
[Seal John A. Shields, United States Commissioner, Southern District N. Y.]

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

SOUTHERN DISTRICT OF NEW YORK, *City & County of New York,* } *ss:*

On this eighth day of Feb'y, A. D. 1886, personally appeared before me William P. Abendroth, Nicholas L. Cort, and Louis T. Lehmeyer, to me known, and known to me to be the individuals described in and who executed the foregoing undertaking, and severally acknowledged before me that they executed the same for the purposes therein set forth.

[Seal John A. Shields, United States Commissioner, Southern District N. Y.]

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

140 *Affidavit of Service of Citation.*

CITY AND COUNTY OF NEW YORK, *ss:*

Supreme Court of the United States.

WILLIAM P. ABENDROTH, Plaintiff in Error,
against
ABRAHAM VAN DOLSEN, WILLIAM H. ARNOTT, Defendants in Error.

Matthew P. Ryan, being duly sworn, says he is a clerk in the office of Arnoux, Ritch & Woodford, attorneys for the plaintiff in error; that on the 13th day of February, 1886, at 395 Canal street, in the city of New York, he served copies of the hereunto annexed citation upon Abraham Van Dolsen and William H. Arnott, de-

fendants in error, by exhibiting to each of them the annexed original citation and by delivering said copies to each of them personally and leaving the same with them; and deponent further says that he is over 21 years of age.

MATTHEW P. RYAN.

Sworn to before me this 15th day of February, 1886.
WILLIAM M. WALLACE,
Notary Public, — County.

141 UNITED STATES OF AMERICA, *ss:*

To Abraham Van Dolsen and William H. Arnott, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the city court of New York, in the city of New York, wherein William P. Abendroth is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 9th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

M. R. WAITE,
Chief Justice U. S.

142 [Endorsed:] Supreme Court of the United States. William P. Abendroth, plaintiff in error, *vs.* Abraham Van Dolsen, William H. Arnott, defendants in error. Citation. Arnoux, Ritch & Woodford, attorneys for plaintiff in error, 18 Wall street, New York city. Service of copy within is hereby admitted. N. Y., Feb'ry 12, '86. Norwood & Coggeshall, def'ts' att'ys.

143 [Endorsed:] City court of New York. Abr'm Van Dolsen *et al.* ag'st Wm. P. Abendroth *et al.* Return to writ of error.

Endorsed on cover: New York city city court. No. 229. William P. Abendroth, plaintiff in error, *vs.* Abraham Van Dolsen and William H. Arnott. Filed March 11th, 1886.

MAY 12 1905
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 260.

WILLIAM P. ABENDROTH,

Plaintiff in Error,

against

ABRAHAM VAN HOLSEN et al.,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

WM. H. ARNOUX,

Of Counsel.

Evening Post Job Print, New York.

Supreme Court of the United States.

OCTOBER TERM, 1888.

WILLIAM P. ABENDROTH, *Plaintiff in Error*, *vs.* ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT.	No. 229.

Statement of Facts.

This is a writ of error duly allowed, by which a judgment of the City Court of the City of New York, entered on a remittitur from the Court of Common Pleas, involving the construction of a statute of the United States is brought before this Court for review.

The case arises out of the following circumstances:

On the 23d day of December, 1870, Mr. Abendroth, the plaintiff in error herein, with John Griffith and George W. Wundram, formed a copartnership which was intended to be a special partnership with Mr. Abendroth, as special partner, which was to commence on the first day of January following. On the day he signed the articles he gave his check for his special contribution, dated the 31st day of December, which was duly paid on the day that the firm commenced business.

On the 30th day of November, 1872, an adjudication of

the bankruptcy of the firm of Griffith & Wundram was duly made in the United States District Court, and notices were sent to all the creditors, and the matter was duly advertised as prescribed by law.

At the meeting of creditors duly called, the plaintiff in error was duly appointed assignee in bankruptcy, and such election was approved by the Court.

Mr. Abendroth purchased and took assignments of several claims against the debtors.

He as assignee converted the assets of the bankrupt estate into money and prepared to declare a dividend. As the holder of said claims he proposed to pay to himself the dividend due thereon, when one creditor, Mr. McDonald, opposed and made a motion that such claim should expunged. The matter was referred to the Register, who reported that Mr. Abendroth was a special partner, that Griffith & Wundram were the general partners, that the claims had been duly assigned to Mr. Abendroth, that they had been duly proved, that he was entitled to the dividend, and that the motion should be denied.

The report was confirmed and the order made.

Subsequently an application for discharge was made by the debtors.

While the proceedings were thus pending, and or on about the 18th day of June, 1877, this action was brought in the City Court of the City of New York by the defendants in error against the three members of the firm upon a provable debt, to wit, a promissory note, dated in August, 1872. In the complaint the plaintiffs therein allege that John Griffith, George W. Wundram and William P. Abendroth were copartners in business, under the firm name of Griffith & Wundrum, and under their said firm name made said promissory note.

The plaintiff in error herein alone served an answer in the action. He denied the alleged partnership, pleaded that he was a special partner, and set up the proceedings and adjudications in bankruptcy in bar and in abatement of this action.

Under the issues thus made the cause came on to be tried before McAdam, *C. J.*, on the 7th day of June, 1882. He delivered an opinion which will be found in the Record, pp. 58, 59, and directed judgment for plaintiffs for the amount claimed.

Upon appeal the judgment was affirmed.

Thereupon Mr. Abendroth sued out this writ of error.

The following decisions have been made in controversies arising out of this partnership.

Durant *v.* Abendroth, 69 N. Y., 148.

The issue in this case was simply whether Mr. Abendroth was liable in an action at law. The Court held that he was, Church, *Ch. J.*, and Earl, *J.*, dissenting. In the opinion it is said:

"The capital was in fact paid on the 2d of January; but no affidavit of that payment was filed as required by the statute. The affidavit made on the 23d could not be made true by that subsequent payment. The parties have made a careless, though no doubt, innocent mistake; but they have failed to comply with the statute, and the special partner is therefore deprived of its protection. If the Court had the power to rectify such a mistake it would gladly do so in this case; but it does not possess the power."

Van Dolsen *v.* Abendroth, 43 N. Y. Supr. Ct., 470.

This was an appeal from an interlocutory judgment rendered upon a demurrer to the plea in bankruptcy, holding the plea good and will be referred to in the points.

In re Griffith, 18 N. B. R., 510.

This was a motion by the defendant in error herein to have the proceedings in bankruptcy dismissed for want of jurisdiction, because Mr. Abendroth had not been made a party. The motion was denied.

The opinion of Choate, *J.*, will be cited in the points.

Durant *v.* Abendroth, 97 N. Y., 132; 44 N. Y., Supr., 243.

This was an appeal from a judgment, wherein the Court of Appeals passed upon the bankruptcy plea, holding that it was simply an adjudication *in rem*. This will be more fully considered in the points that follow.

Assignment of Errors.

First.—The State courts erred in holding that the proceedings in the United States Court in bankruptcy is in the nature of a proceeding *in rem*, and that the decree was not conclusive as to any fact in a subsequent personal controversy between the parties to this action.

Second.—The State courts erred in holding that the bankruptcy court could deal with Mr. Abendroth in no other right or capacity than as a creditor only.

Third.—The State courts erred in holding that the bankruptcy court did not and could not have adjudicated the question whether Abendroth had incurred the liability imposed by 2 R. S., N. Y., Sixth Edition, 1154, section 8.

Fourth.—The State Court erred in holding that the question of the liability of Mr. Abendroth as a partner was not before the bankruptcy court, and did not belong there for adjudication.

Fifth.—The State Court erred in holding that the determination of the question of the bankruptcy of Griffith & Wundram, and the administration of their estate did not directly or indirectly involve the question whether Abendroth, a creditor in the bankruptcy proceedings, was liable under the statute to the plaintiffs in the action who were also creditors there for the debt owing by the bankrupt firm.

Sixth.—The State Court erred in holding that the jurisdiction of the bankruptcy court is limited to the deter-

mination of the claims, which the creditors present against the bankrupt estate.

SEVENTH.—The State Court erred in holding that the bankruptcy proceedings are not a bar to this action.

EIGHTH.—The State Court erred in holding that the bankruptcy proceedings do not abate this action.

NINTH.—The State Court erred in holding that the bankruptcy proceedings have no relevancy to the question introduced in the present litigation.

POINTS.

I.

This Court has jurisdiction to pass upon the questions involved in this writ of error.

The U. S. R. S., § 709, provide that

"A final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had," &c., "may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Under the Code of Civil Procedure, § 191, sub. 2, appeals in actions arising in the Marine Court may be reviewed in the Court of Common Pleas, which court may allow *ex gratia* an appeal to the Court of Appeals, but denied it in this case.

By the Laws of 1883, p. 20, ch. 26, the name of the Marine Court was changed to the City Court.

Thus, so far as the forum is concerned, the writ of error was properly allowed.

The subsequent portions of this brief will make it equally clear, we apprehend, that this Court has jurisdiction to review the questions involved relating to the merits.

II.

Under the proceedings in the United States Court in Bankruptcy *in re* Griffith & Wundram, it was judicially determined that John Griffith and George W. Wundram alone comprised the firm of Griffith & Wundram, and such adjudication is binding upon the creditors of said firm.

FIRST.—The adjudication in bankruptcy whether it be a judgment *in rem* or *in personam*, are necessarily involved the determination of the membership of said firm, and is conclusive in any collateral proceeding or action.

In an action brought by the same plaintiffs as appear in the case at bar against the same defendants in the New York Superior Court, a demurrer was interposed by plaintiffs to the plea of bankruptcy contained in defendants' answer. The General Term of said Court overruled the demurrer, holding the plea presented a good defense.

Curtis, *Ch. J.*, delivering the opinion of the Court, after stating the facts, said: "It would thus appear that the plaintiffs were parties to those proceedings in which it was competent for them to have had the defendant Abendroth adjudged a general partner if they had interposed such a claim and established it by proof. * * By this adjudication (the adjudication in bankruptcy) the defendant Abendroth was held to be a special partner, and hence in the position that the law declares of not being liable for the debts of the partnership beyond the sum contributed by him as capital to the firm, as far as the defendant Abendroth is concerned. If * * such adjudication was not in accordance with the proofs, they should have availed themselves of the relief and the means of review afforded them by the Acts of Congress affecting proceedings in bankruptcy. This adjudication appears to embrace all the elements to sustain the defense of *res adjudicata*. The Court was of competent jurisdiction. The parties were before it to have their respective rights determined. * * The same question sought to be

raised anew in this action was then determined. Under such circumstances it would be inconsistent with well settled rules that the parties should again be allowed to litigate a subject matter which was or which even could have been determined in the proceedings in the United States District Court."

Following the suggestion of the Superior Court in part, these plaintiffs by their present attorneys and counsel on the 28th of March, 1878, presented a petition to the United States District Court, setting forth that they were creditors who had never proved their debts, that the bankrupt firm was composed of defendants, of which fact plaintiffs had long been ignorant, supposing that Mr. Abendroth was a special and not a general partner; until the Court of Appeals had decided otherwise, and prayed that the adjudication be vacated on the ground that the Court had no jurisdiction over copartnerships unless all the copartners are made parties and adjudicated, and therefore that the Court had no jurisdiction in the case, as appears from the report *in re* Griffith, 18 N. B. R., 510.

The application was heard by Choate, *J.*, who denied the petition. In his opinion he said: "Assuming that all the facts relied on are as claimed by the petitioners, still they cannot claim *as of right*, as creditors of the firm, to have the adjudication set aside. Assuming that the Court has jurisdiction only over all the copartners and not over some of them less than all, still the Court had power and authority, in other words, had jurisdiction, to entertain and determine the question what persons in fact did constitute the firm. The fact that Griffith & Wundram alone did constitute the firm was alleged in the petition, and was necessarily found and determined by the Court, before it could or did determine that the adjudication should be made.

"This was the determination of the Court in the due and proper exercise of its jurisdiction of a *fact*. Now, although that fact may be called a jurisdictional fact, nevertheless the rule of law is, that the determination by the Court of a fact, though a jurisdictional fact, is binding

on all parties to the suit *and on all those who had an opportunity to be heard to contest that fact* (Dyckman *vs.* Mayor, 5 N. Y., 434, and see Bank *vs.* Judson, 8 N. Y., 254).

"Although a case in bankruptcy is anomalous and peculiar in its forms, I think that *the creditors of the firm are bound as parties* by this determination, and are within the application of the principle above stated. The proceeding is against the firm's property and for the benefit of the firm's creditors. While they do not receive notice of the original application, they are made parties to the proceeding in form immediately afterwards, and are notified to come in and participate therein.

"No doubt if they have any interest adverse to the adjudication * * they may have an adjudication set aside on the ground that the Court erred in determining the jurisdictional fact. * * but until the proceeding is thus opened and the fact redetermined, the judgment of the Court stands and must stand as against all parties and all persons allowed to come in and be made parties. * *

"The ground taken, that the adjudication is in itself absolutely void, is not tenable.

"It is a judgment of a court based upon the determination of a fact which it had jurisdiction to determine, and as such it is valid until set aside or reversed. * *

"Perhaps these petitioners have a remedy now by having Abendroth brought in and adjudicated as a partner with Griffith & Wundram."

An appeal was taken from Judge Choate's decision to Mr. Justice Blatchford, sitting in the United States Circuit Court upon review of bankruptcy matters, by whom the decision was affirmed.

After this result was reached, some of the creditors of Griffith & Wundram, seeking still to involve Mr. Abendroth in the said bankruptcy and enlightened by the opinion of Judge Choate, filed, in conjunction with one of the bankrupts, petitions praying that the adjudication might be opened and the proceedings amended by bringing in Mr. Abendroth as an alleged partner. The application

was denied for want of equity and for laches. In the course of his opinion, unreported (in the Matter of Griffith), from which the foregoing facts are taken, Judge Choate said: "On the 30th of November, 1872, the firm having become insolvent, on the petition of Wundram, praying that he and his alleged partner, Griffith, composing the firm of Griffith & Wundram, be adjudged bankrupts, and they were so adjudicated, and this is the decree which the Court is now asked to open. * * The grounds on which this relief is asked are that the adjudication of November 30, 1872, was upon a false suggestion as to the fact; that Griffith, Wundram and Abendroth in fact composed the firm of Griffith & Wundram, but that the petition of Wundram against Griffith alleged that Griffith and Wundram composed the firm, and there being no denial, an adjudication was made accordingly; that such adjustment is being used in the State Courts by Abendroth against the present petitioners, creditors of the firm, to defend against their suits to recover of him as a general partner the amount of their debts; that the decree of this Court has been held to be, as against them, an adjudication of the fact that Abendroth was not a member of the firm; that this is a misuse of the records of this Court, a use of them to establish a falsehood which this Court should protect parties against by allowing such an amendment as will permit the truth to be shown. * * *

"The ground on which the adjudication has been operated to prevent the creditors from pursuing their remedies against Abendroth in actions to recover their debts, is that stated in the former decision in this matter above referred to (18 N. B. R., 510), that the creditors, being parties to this proceeding, are bound by the adjudication and by the determination of all facts necessarily found by the Court as the basis of the adjudication, among which is the fact alleged and found that John Griffith and George W. Wundram composed the firm of Griffith & Wundram; that they, the creditors, are therefore estopped by the adjudication to deny that fact."

The entire opinions, of course, have not been quoted, but enough is given to establish that Judge Choate in the first motion did decide that the adjudication in bankruptcy involved necessarily the determination of the fact of the membership of the partnership of Griffith & Wundram.

And in deciding the second motion, the Judge makes it impossible to mistake that that was the ground of his first decision.

Special stress is laid upon this because the counsel for the defendants in error, in a printed brief submitted to the Superior Court, has urged that "Van Dolsen & Arnott did not prove their claim in bankruptcy, and Judge Choate regarded that as an answer to their procedings," and may present the same view here, and this, we apprehend, is erroneous.

But in support of Judge Choate's opinion, further citation from the same brief may profitably be made, for it will not be presumed that the law will be unfavorably stated by him from his standpoint. The case of Gates *v.* Preston, 41 N. Y., 113, wherein an action for damages for malpractice was defeated by a prior judgment recovered on default by the physician for the amount of his bill for services in the same matter, has this comment, with the italics as here presented:

"The justice's judgment *necessarily involved* a decision upon the question of the surgeon's negligence and malpractice, because the *very gist* of his cause of action before the justice was that he had performed his services skillfully and dutifully, and *therefore* the justice's judgment was *directly upon the point* involved in this action."

Applying this commentary to the case at bar, undoubtedly "the point involved in this action is whether Mr. Abendroth was a general partner in the bankrupt firm of Griffith & Wundram?"

An adjudication in bankruptcy is a judgment, and that

"judgment necessarily involved a decision upon the question" who composed that firm, it was "the very gist of" the proceeding, "and *therefore* the judgment was *directly upon the point* involved in this action."

To this argument it cannot be justly said that all this may be true, and yet the plaintiff in error be liable in this action, because he was not liable as a general, but as a special partner, because the decisions made in the courts of New York upon this subject hold to the contrary, that the liability, if it exists, is that of a general partner (Durant *v.* Abendroth, 69 N. Y., 148), and that a complaint in form as in this case is proper (Sharp *v.* Hutchinson, 100 N. Y., 533).

The doctrine in the case of Gates *v.* Preston has been criticised, but in the light of such criticism, the Court has reaffirmed the doctrine in a similar case in Glaucius *v.* Fogel, 88 N. Y., 441, and has extended it as far as to hold that a judgment in summary proceedings is conclusive in an action for rent (Jarvis *v.* Driggs, 69 N. Y., 143).

These decisions are all in harmony with the decisions of this Court, the principal of which relating to this question, is Cromwell *v.* County of Sar., 94 U. S., 353, wherein it is said:

"The judgment in the prior action operates as an estopel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

SECOND.—There was an express adjudication in the matters before the Register that Mr. Abendroth was a special partner and not a general partner, both in his selection as assignee and on the petition of MacDonald.

It is true that this latter proceeding was instituted by one creditor against Mr. Abendroth, but the decision was binding upon all the creditors, whether actors in the motion or not.

After this decision was made and the order affirmed no other creditor could institute such proceeding *de novo*.

In principle it would be the same as saying that no other creditor could now make a motion in the bankrupt court to have the adjudication opened in the matter of Griffith & Wundram, and that the decision therein made on the petition filed was binding, not only upon the petitioner but upon all others similarly situated.

So "if he had been one of the bankrupts the creditors would not have chosen him as assignee and the Court would not have approved the selection," as Mr. Norwood himself says in his points for respondents in Van Dolsen *et al.*, respondents, *v.* Abendroth, Superior Court, General Term.

The counsel for the respondent in error took the extraordinary course of calling his Honor Mr. Justice Blatchford as a witness to attempt to defeat the operation of the adjudications herein referred to. How far this was a success the record discloses (pp. 56, 57).

Notwithstanding the view of the United States courts of their own power and jurisdiction, and the able opinion of the learned Chief Justice of the Superior Court, the Court of Appeals avoided the result of these conclusions, by holding a new doctrine respecting the bankruptcy court, that its adjudications are merely judgments *in rem*, and therefore bind only the property.

We admit that the doctrine "that foreign judgments *in rem* are conclusive only as to the property involved, and may be controverted as to all the grounds and incidental facts on which they profess to be founded," long settled in New York, is contrary to the decisions in the courts of England and in the United States courts (p. 141). Judge Rapallo delivering the opinion of the Court (Durant *v.* Abendroth, 97 N. Y., 132, 140) said:

"Assuming for the purposes of the argument the soundness of this position" ("in adjudging the firm bankrupt the Court must necessarily have adjudged that all the members of the firm were named in the petition") "the difficulty remains that a judgment operates *in personam* only upon the parties appearing before the Court, or

brought before it by proper process, and when this adjudication was made it was wholly *ex parte* except as to Griffith, who was the only party cited. So far as the estate of the petitioning bankrupt is concerned, the proceeding is in the nature of a proceeding *in rem*, and when the *res* is brought within the jurisdiction of the Court, its adjudication is binding upon the interest of every person whomsoever in that *res*. All persons interested therein must follow it and assent their rights or be debarred. But that is the extent to which the judgment binds those who are not personally brought before the Court. * * * When the decree adjudging Griffith & Wundram to be bankrupts was made, neither Abendroth nor the assignors of the plaintiff were parties to the proceedings. It was between Griffith & Wundram alone, and even if the bankruptcy proceedings are treated as proceedings *in rem*, the decree was not conclusive as to any fact in a subsequent personal controversy between the plaintiff or his assignors."

Throughout all this there is a *petitio principii* which invalidates the reasoning even if it were otherwise sound. Every reference to the decree is of the time when it was made. But it does not follow that a decree may not subsequently bind a party not originally served. On the contrary, there is an express statute in the State of New York, whereby after a judgment *in personam* is recovered against a partnership by the service of one partner, an order may be obtained against the unserved partner to show cause why he should not be bound thereby, and the final order makes the judgment as binding upon him as if he had been served before judgment.

The United States Court in Bankruptcy first grants judgment which operates to hold the debtor's property and then issues a citation to creditors who thereby becomes *ipso facto* parties to the proceedings, and they may take any steps to protect their rights as the defendants in error have done in the proceedings heretofore adverted to. All this the opinion of the Court ignores. Ignores in the face of the fact that the creditor had proved his debt and accepted his

dividend, as to which the opinion says: "It surely could not have the *effect of estopping them personally*, in a subsequent controversy with Abendroth as to every matter adjudicated in these proceedings or involved in the adjudication though not litigated."

If this reasoning is correct, if a creditor is no party to to the adjudication, if his proof of debt and participation in the dividend of the estate do not bind him personally, if the whole proceeding is *in rem* exclusively, then the provisions of the law as to discharge becomes wholly ineffective and unconstitutional, and notwithstanding their explicit mandate, cannot be a defense to any discharged bankrupt, because a general defense that is good as to any partner in an action brought by any creditor of the partnership is a defense to all.

Judge Rapallo also says, and we submit without due reflection, in relation to the MacDonald claim, "it was *res inter alios acta*," for the reasons that we have already briefly given.

If we, following the decisions of the United States Courts, have correctly stated the law on this point, then this Court must reverse the judgment of the State court upon the ground that the adjudication pleaded is binding upon the defendants in error.

That judgments *in rem* do have a personal effect was determined in the case of Roderigas *v.* East River Savings Inst., 63 N. Y., 460, where a live man was denied his estate because an administrator had been appointed thereon, the Court having thereby judically and unimpeachably determined he was dead.

In *re Wallace*, Deady, 423, the Court held:

An adjudication declaring a person a bankrupt is in the nature of a judgment *in rem*, and notice to and binding upon all the world, and therefore creditors of the bankrupt had constructive notice of the decree and were bound thereby.

But the jurisdiction of the bankruptcy court is not a jurisdiction *in rem* in whole, even if in part.

The very statement of the scope of the jurisdiction of courts of bankruptcy in § 4972 completely negatives such an idea.

And the discharge by § 5119 releases the bankrupt personally from all debts, claims and demands which might have been proved against his estate in bankruptcy.

So in the inception and the conclusion, as well as in all intermediate stages, bankruptcy proceedings are in the nature of actions in equity, and bind both property and persons.

A proceeding to have a debtor adjudged bankrupt is substantially an action at law, and terminates with the final judgment on the petition or verdict therein.

Re Oregon Bulletin Co., 14 B. R., 394; 3 Sawyer, 529.

A petition in bankruptcy is an action or suit, and an adjudication of bankruptcy thereon is a final judgment beyond the power of Congress to annul or set aside.

Re Comstock, 3 Sawyer, 128.
Re Raffauf, 6 Biss., 150.

Full and complete jurisdiction in bankruptcy proceedings for all purposes whatever is conferred by the petition, adjudication and warrant, whether in voluntary or involuntary proceedings.

Re Archenbrown, 11 B. R., 149.

The adjudication in bankruptcy is a decree of the Court defining the legal status of the bankrupt.

Blumensteil's Bankruptcy, 73.

THIRD.—So long as the adjudication in bankruptcy remains in full force and unreversed it is a valid and complete bar to any action that may be brought by any creditor against the defendants, even if they had been general partners.

This is the law as expounded by both elementary writers and by decisions.

Collyer on Partnerships (§ 756) says:

"Where an action is brought against some of the partners of a firm and the *defendants* recover a verdict, and afterwards a new action is brought against *the other partners* for the same demand, they may plead the former judgment in answer to the action; because otherwise, if a verdict should be recovered against the latter partners, they might call on their copartners for contribution, and the latter would thus be made circuitously to pay the plaintiffs after having obtained a verdict in the action brought directly against them."

Chitty on Pleadings (50 Note U[1]), presenting the subject in the other alternative, says:

"When there are dormant partners in a firm, and that fact being unknown to the plaintiff he sues, the ostensible partner or partners upon a cause of action on which the whole firm are liable and *recovers a judgment* which is unsatisfied; this may be pleaded in bar to a subsequent suit upon the same cause of action in which he joins the ostensible and dormant partners as defendants."

The same question arose in Robertson *v.* Smith (18 Johns., 459) where plaintiff recovered judgment on a firm note against two partners and subsequently discovered two others brought his action against all. It was held that the former judgment was a bar as to all, including the two not formerly sued. Spencer, *J.*, delivering the opinion of the Court, said:

"The plaintiff has already a judgment upon these notes against two of the defendants and may proceed to execution. In the present suit the same defendants are made parties, and necessarily so, and in this suit also if the plaintiff can recover, there must be judgment against them; so that with regard to the two defendants, there will be on the records of this Court two distinct judgments for the same debt. This certainly is an anomaly in the law."

In *in re* Collier, 12 N. B. R., 266, it was held that a claim may be limited to one partner.

In Hoyt *v.* Freel, 4 N. B. R., 131, 139, the Court, by Jones, *J.*, said:

"It is a well established principle of law that in cases of partners (and joint contractors) an action must be brought against all the partners and all the joint contractors, and must proceed against them all, and the judgment to be rendered must be a joint judgment against all, unless one or more of them shall have died or have been discharged."

These authorities effectually dispose of the opinion of Chief Judge McAdam in the case at bar.

He says of the bankruptcy proceeding "It was a proceeding between Griffith & Wundram, the general partners on the one hand, and the firm's creditors on the other," which is true. "Abendroth was not a party except as a creditor," which is also true. But his conclusion that for that reason "the bankruptcy proceedings are not a bar to this action," we claim to be erroneous. If in this action as "between Griffith & Wundram, the general partners on the one hand, and the firm's creditors on the other, the plea of the adjudication is good, then under the authorities, it is good as to Mr. Abendroth, also the unserved partner, so to speak, for he has been held by the Court of Appeals to be a general partner.

The position of the case then is this under the contention of the plaintiffs in the Court below.

The firm of Griffith & Wundram was composed of the defendants as general partners, including the defendant Mr. Abendroth.

An adjudication has been made against John Griffith and George W. Wundram alone as composing said firm, and that remains in full force and unreversed.

The creditors, including plaintiffs, have endeavored unsuccessfully to invalidate that adjudication.

Suit has been brought against the three on a firm obligation.

The adjudication is a bar to such action.

III.

The pendency of proceedings in bankruptcy is good as a plea in abatement of any action subsequently brought in the State courts against the debtors for the recovery of a personal judgment upon a chose in action made by the partnership.

The Bankrupt Act divided all contract creditors of bankrupts into two classes:

1. Those having debts proven.
2. Those having debts provable.

§ 5106 divides the former class into two subdivisions: those who have proved their debts after action, those who have brought their action after proof.

In Wilson *v.* Capuro, 4 N. B. R., 714, it was held by the Supreme Court of California that it was the intent of the Bankrupt Act that the Federal tribunals should have exclusive control, and therefore a creditor who has proved his debt cannot maintain an action on the same demand against the bankrupt. His right of action in the State court as well as the Federal courts is thus waived.

§ 5105 relates exclusively to the class of provable but unproven claims to which the cause of action herein belongs. This enacts that "no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit until the question of the debtor's discharge shall have been determined, and any suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the Court in bankruptcy."

This section, applicable alike to suits brought before and after bankruptcy, has two provisions:

Prohibition as to creditors.

Protection as to bankrupts.

And these provisions are obligatory upon State Courts as well as the Federal Courts.

In re Rosenberg, 2 B. R., 236; 3 Ben., 14.
In re Metcalf, 1 B. R., 201; 2 Ben., 78.
Samson *v.* Burton, 4 B. R., 1; 5 Ben., 325.
Delavergne *v.* Farrant, 1 Mich. N. P., 90.

This section (5105) is in substance to be found in the English Bankruptcy Acts of 1869 and 1883. § 9 of the latter act provides that after the making of the receiving order—

"No creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or legal proceedings unless with the leave of the Court, and on such terms as the Court may impose."

The very provision that in certain cases the suit *by leave* of the court in bankruptcy may proceed to judgment for the purpose of ascertaining the amount due, establishes, first, that it is *only* by such leave that the suit may proceed; and, second, that the only purpose for which such suit may proceed is to ascertain the amount due.

There is no such controversy in this case.

It might be said in a narrow, technical spirit that no one could apply for the stay there provided except a *bankrupt*, and that if Mr. Abendroth had made a motion for such stay he would be estopped from denying that he was one of the bankrupts.

But no one can explain away the prohibition. "No creditor shall be allowed to prosecute to final judgment," and therefore the plea in abatement, if either defendant could plead it or have the benefit of it, is good.

It has been judicially determined, and it is obvious without reference to any decision, that the object of this section is to protect the bankrupt from being harassed with suits while he is proceeding in good faith to obtain his discharge and until his discharge is determined. And if the debtor obtains his discharge this class of creditors equally with those whose debts have been proven are bound by the adjudication personally.

And here it may be remarked in opposition to the views of Judge Rapallo, on the hearing of the bankruptcy proceeding, that a final judgment *in rem* can never become a personal judgment against one not a party thereto. It

follows by invertion that the final judgment that affects personally directly is pronounced in a proceeding *in personam.*

But if the debtors proceeded against can plead the discharge of the partnership in bar, then such plea is available forAbendroth under the decisions heretofore cited.

And if such plea would be good in bar, then the pendency of proceedings having such possible issue would be good also as a plea in abatement.

IV.

The judgment as to which the writ of error was allowed should be reversed and a new trial awarded, with costs to abide the event.

Wm. H. Arrowsmith

Of Counsel for Plaintiff in Error.

Supreme Court U. S.
FILED,
MAR 16 1889
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1888.

No. 229.

WILLIAM P. ABENDROTH,
Plaintiff in Error,

vs.

ABRAHAM VAN DOLSEN AND WILLIAM H. ARNOTT.

BRIEF FOR DEFENDANTS IN ERROR.

CARLISLE NORWOOD, JR.,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

WILLIAM P. ABENDROTH, Plaintiff in Error, vs. ABRAHAM VAN DOLSEN and WILLIAM H. ARNOTT, Defendants in Error.	No. 229.

Brief of Counsel for Defendants in Error.

Statement of Facts.

This is a writ of error to the City Court of New York (Orig. 2) to review a judgment of the Court of Common Pleas of the County of New York, on appeal, affirming a judgment of the City Court and remitting the judgment to the latter court for enforcement.

Van Dolsen and Arnott, defendants in error, as plaintiffs in the Court below, sued William P. Abendroth, the plaintiff in error, as defendant below, in the City Court of New York to charge him with a statutory liability upon an obligation, to wit, a promissory note, of a firm of Griffith & Wundram.

Though the complaint (Orig. 23) *in form* charged that Abendroth and his co-defendants, John Griffith and George W. Wundram were co-partners the liability enforced was one imposed by the limited or special partnership act of the State of New York, Abendroth having been a special partner in the limited partnership of Griffith & Wundram.

The form of pleading for the assertion of the liability enforced against Abendroth has been approved by the highest Court of the State of New York.

Sharp *v.* Hutchinson, 100 N. Y., 533.

The facts established on the trial of this case, out of which the liability of Abendroth arose, were these:

Abendroth with John Griffith and George W. Wundram took measures to form a limited partner ship under the Statutes of New York (1 New York R. S., Chap. IV, Art. 1, p. 763, original paging).

They filed the certificate and affidavit called for by the statute (Orig. 38 to 39), and obtained an order for publication of the terms of the partnership (Orig. 39).

Abendroth was designated as the special partner and the other two as the general partners, and the firm name as Griffith & Wundram (Orig. 38).

The statute contained a provision as follows: * * "and if any false statement be made in such certi-"ficate, or affidavit, all the persons interested in "such partnership shall be liable for all the en-"gagements thereof as general partners."

Abendroth paid in the capital in a post-dated check (Orig. 40), and *upon the exact facts* (as to Abendroth's liability), of this case, the N. Y. Court of Appeals decided that the statement in the statutory partnership papers that the capital had been

paid in cash, was false, in that a post-dated check was not such cash.

Durant *v.* Abendroth, 69 N. Y., 148.

The answer in this case, after controverting the alleged liability (Orig. 24), set up that the partnership was limited, and that Abendroth was the special partner only (Orig. 25), and then (Orig. 26, 27) pleaded a prior adjudication in the District Court of the United States for the Southern District of New York in bankruptcy, in certain bankruptcy proceedings of the firm of Griffith & Wundram, and claimed that in such proceedings "it was duly adjudged and determined "that John Griffith and George W. Wundram, the "bankrupts in this bankruptcy, were the general "partners in the limited partnership of Griffith & "Wundram, of which William P. Abendroth, this "defendant, was the special partner." (Orig. 27.)

For a further defense, there was pleaded an order of Mr. Justice Blatchford, made in the bankruptcy Court, confirming an opinion of a register in bankruptcy (Orig. 28). This will be explained *post* more fully.

On the trial (Orig. 102) the defendant amended his answer, so as to elaborate the defense of a prior adjucation, but the defense was practically the same, as defendant had then made all his proofs and the amendment went only to the form of the pleading.

These proofs to sustain the defence of a prior adjudication were the records of the bankruptcy proceedings of the firm of Griffith & Wundram, on the 23d of November, 1872 (Orig. 41.) Wundram presented his petition to the Hon. Samuel Blatchford, then Judge of the District Court of the United States for the Southern Judicial District of New York, setting forth that he was a member of the

copartnership consisting of himself and John Griffith, carrying on business under the firm name of Griffith & Wundram within that judicial district, and that Griffith was unwilling to join in the petition and was out of the United States and in England, and that the members of the partnership were jointly and severally unable to pay their debts in full, and that the petitioner was willing to surrender his estate and the effects of the said partnership for the benefit of the partnership and individual creditors. The usual schedules were annexed to the petition and the petition contained the other usual averments in such cases but no mention was made of Abendroth in the petition and he was not named in the schedules except that in the schedule of creditors he was stated to be one of the creditors of the firm. Van Dolsen & Arnott also appear in the schedule as creditors of the firm (Orig. 45). Upon this petition an order dated November 23d, 1872, was made, entitled In the Matter of John Griffith and George W. Wundram, composing the firm of Griffith & Wundram (Orig. 54), and requiring Griffith to show cause why the prayer of the petition should not be granted. This order to show cause contained no reference to Abendroth and was not directed to him (Orig. 55). The Marshal made service on Griffith (Orig. 56), and on proof of such service on November 30th, 1872, the usual adjudication of Bankruptcy was made (Orig. 56, 58). This adjudication recited the petition of Wundram and that it required Griffith to appear and show cause (Orig. 57), why he and the partnership of Griffith & Wundram should not be adjudged bankrupt and adjudged that John Griffith and George W. Wundram and the partnership of Griffith & Wundram became bankrupt, and directed Griffith only to file a schedule of

his creditors and an inventory of his estate (Orig. 57).

There was no proof or pretense of proof that Abendroth was a party to this adjudication or that he had any notice of it or that Van Dolsen and Arnott were parties or had any notice of it, except in some of the subsequent proceedings.

There was also read in evidence the usual warrant of seizure upon an adjudication of Bankruptcy, directing the Marshal to take possession of the estate and to publish the usual notice of a meeting of the creditors to choose an assignee (Orig. 59, 61), and there was proof made of the publication of the notice (Orig. 63,64). There was also read in evidence the assignment of assets to the Register in Bankruptcy under the adjudication and it purported to be made by John Griffith and George W. Wundram carrying on business under the name of Griffith & Wundram (Orig. 65), and was signed in the firm name per G. W. Wundram.

There was also read in evidence the certificate of the Register showing that at the first meeting of the creditors William P. Abendroth was chosen the Assignee in Bankruptcy (Orig. 67), and it appears upon the face of that return that Van Dolsen & Arnott did not participate in the choice of the assignee. It was also shown that the assignee accepted the office (Orig. 69, 70).

In addition to the above records of the Bankruptcy Court and to sustain the defence set up in the supplemental answer, *ante* (Orig. 28) the defence put in evidence the call for the statutory second meeting of creditors (Orig. 70, 74) and then some proceedings which originated at the second meeting of the creditors as follows: Joseph McDonald & Co. creditors of the bankrupts, at this second meeting in August, 1873 (Orig. 74, 76), presented a petition to the Register in Bankruptcy, setting forth that

on the 21st of November, 1872 (two days before the filing of the petition in Bankruptcy), certain other creditors had agreed to sell their claims to Abendroth at 25 cents on the dollar, and had afterwards proved said debts in Bankruptcy, and that such debts so proved had been assigned to Abendroth, and that he had thus been enabled to elect himself assignee, notwithstanding the fact that he was a special partner in the said bankrupt firm (Orig. 76), and they protested against the allowance of any of such claims, and prayed that the proof of such debts might be expunged on various grounds. A schedule of the particular claims referred to was annexed to the petition (see list of such claims Orig. 93, 94). Upon this petition (Orig. 76, top printed page 38) an order was made for a hearing on the petition before the Register, and directing that five days notice be given by mail, addressed to said creditors, that is, to the creditors whose claims it was sought to have expunged and disallowed. Van Dosen & Arnott were not among such creditors, and there is no pretense that they were or that they received the notice required by such order to be given only to the creditors whose claims were the subject of McDonald & Co.'s attack. On the contrary, any inference that they were parties to this particular proceeding is negatived by the order which was entered subsequently to the filing of the Opinion of the Register, and which recites the names of all creditors who had any notice of such proceedings, and Van Dolsen & Arnott are not among them (Orig. 93, 94).

Proceedings under this order were had before the Register which resulted in his making a report or opinion to the Bankruptcy Court. The document is entitled "Opinion of the Register" (Orig. 77), and recites what questions arose before him, and among others that it was claimed by McDonald &

Co. that the debts assigned to Abendroth should be disallowed because Abendroth was a special partner in the Bankruptcy firm, the petitioners relying upon a provision of the Limited Partnership Statute of New York (1st N. Y. R. S., 767, Sec. 23), that in case of the insolvency or bankruptcy of the partnership, no special partner was, except in certain special excepted cases, under any circumstances to be allowed to claim as a creditor until the claims of all the other creditors of the partnership shall be satisfied. The Register overruled this point, holding that in respect to these assigned claims Abendroth stood in the shoes of his assignors, and was a creditor, as their representative, and not otherwise.

No issue was made as to Abendroth holding any other relation to the partnership than that of special partner, this exception of McDonald & Co. being expressly based upon the fact that he was a special partner (Orig. 82, 91). The order entered under the direction of Mr. Justice Blatchford was filed October 8th, 1877, and dated back to October 13th, 1875 (Orig. 93), and recited the proceedings before the Register and adjudged that Abendroth was entitled to receive a dividend on the assigned claims, and that those particular claims ought not to be expunged or diminished (Orig. 95, Print 50).

The defence also read in evidence the certificate of the Register, showing which creditors had proved their debts in Bankruptcy, and Van Dolsen & Arnott were not among them (Orig. 97).

The defence also read in evidence from the list of debts proved an entry showing that Abendroth and McDonald & Co. had proved debts (Orig. 98, 100 & 101).

Mr. Justice Blatchford, called as a witness for the plaintiff to rebut any inference that could possibly be drawn from the Bankruptcy records to sustain the defence of a prior adjudication, testified

(Orig.105), that nothing was brought before him except what appeared on the face of the papers, and that the name of Abendroth was not mentioned except as it appeared in the schedules, and that from those papers he could say that Abendroth did not appear personally or by counsel, and that if the adjudication in Bankruptcy on the petition was, in law, the passing on the question of whether or not Abendroth was a member of the firm of Griffith & Wundram, then he passed on it, but that otherwise he did not pass on it; that he did not pass on it, in fact otherwise than as the papers show (Orig. 106), and that no question affecting Abendroth's relation to the firm was passed upon by him otherwise than as appeared by the Bankruptcy papers shown. He further testified as to the order of October 8th, 1877, made on the Opinion of the Register; that as a matter of fact he did not pass on any question discussed in the report of the Register, except his conclusion that the claims assigned to Abendroth ought not to be expunged or diminished, and that he was entitled to dividends on such claims.

The Court before which the action was tried expressly based its decision upon the ground of the statutory liability imposed upon Abendroth by reason of the false statement contained in the Certificate and Affidavit filed on forming the limited partnership (Orig. 108), and the Court held that a limited partnership had been formed, in which John Griffith and George W. Wundram were the general partners and William P. Abendroth was the special partner (id.), and it said that while Abendroth was liable in form as general partner this liability, as a sort of penalty, did not alter the fact that as between themselves the parties were just what they had contracted to be, to wit, Griffith and Wundram were the general partners and Abendroth the special,

and that the general partners as a firm became bankrupt and were formally adjudicated bankrupts, and that the proceeding was one between Griffith and Wundram, the general partners, on the one hand and the firm's creditors on the other, and that Abendroth not a party except as a creditor and that the Bankruptcy Court did not and could not have adjudicated the question whether Abendroth had incurred liability imposed by the statute, because that question was not before that Court and did not belong there for adjudication (Orig. 110).

The Court based this construction of the liability enforced against Abendroth upon the above cited decision of the highest Court of the State of New York (69 N. Y. 148, *ante*,).

In speaking of the Bankruptcy records the Court said:

"The record in the Bankruptcy Court was truthful in point of fact, and this is all that it implies. "The parties were correctly described, that is to "say, in speaking of them in the proceedings subsequent to the adjudication 'Griffith and Wundram' were called 'general partners' and 'Abendroth' special. There was no impropriety in applying these terms to the defendants nor does "their use give any legal force to the contention "that the plaintiff's demand here was adjudicated "there (Orig. 111). If Griffith and Wundram had "brought an action as a firm, Abendroth could not "have been joined as a plaintiff (Schultur *v.* Lord, "4 E. D. Smith, 206; 2 R. S., 6th ed., p. 1156, "§ 14)."

"He was certainly not a necessary party at all "events. Upon the entire case I hold and decide "that the Bankruptcy proceedings are not a bar to "this action; that the issue determined here was "not and could not have been adjudicated there, and

"that the Bankruptcy proceedings have no relev-
"ancy to the questions introduced in the present
"litigation." (Orig. 111).

Point I.

No Federal question is involved here and, therefore, after an examination of the record, the judgment below should be affirmed.

(*a*). The ground upon which a judgment was rendered against Abendroth was that upon the facts established he had incurred a statutory liability to Van Dolsen and Arnott co-extensive with the ordinary liability of a partner to a firm creditor. But the Court did not hold that he was anything but a special partner in the partnership of Griffith and Wundram.

(Original, p. 109).
Durant *v.* Abendroth, 69 N. Y., 148.
Durant, Jr., *v.* Abendroth, 97 N. Y., 132.

In Durant *v.* Abendroth, *ante*, the N. Y. Court of Appeals held that the statements in said certificate and affidavits were false within the meaning of said statute (§8), and that Abendroth was liable as a general partner for the debts of the firm. But it did not hold that he was in fact or in law an actual general partner.

In Durant, Junior, *v*, Abendroth, *ante*, the Court of Appeals, in speaking of the former case, said (97 N. Y., p. 138), upon the same facts: "It was held "by this Court in the case of Durant *v.* Abendroth "(69 N. Y., 148), to make the special partner liable, "as a general partner, for all the engagements of "the firm (1 R. S., 763, §8). The personal liability "of Abendroth was thus clearly established."

* * * * * And that: "Notwithstanding the erroneous statements in the affidavit as to the payment of the capital, the partnership was, in form, a limited partnership, and subject to all the rules applicable to such partnerships. If it had undertaken to make an assignment with preferences, such an assignment could not have been sustained on the ground of the violation of the statute. That violation could be taken advantage of only by creditors, and its consequence simply was to give them recourse against the special partner personally, as if he had been a general partner. By resorting to the trust fund brought into the Bankrupt Court, it cannot be that they waived or lost the recourse the statute gave them against the special partner" (idem., pp. 144, 145).

And in the case at bar the City Court placed its decision explicitly on the ground of the statutory liability incurred by Abendroth by making the false statement contained in the certificate and affidavit filed on forming the limited partnership. Judge McAdam, in delivering the opinion in the case at bar said (Orig. 108-109): "The evidence shows that the three defendants formed a limited partnership under the statutes of this state (2 R. S., 6 Ed. 1153), in which Griffith & Wundram were the general partners and the defendant Abendroth the special.

"They complied with all the formal requirments of the Statute in regard to signing, acknowledging, filing and publishing the certificate provided for therein, as well as the requirement that an affidavit shall be filed proving that the sum contributed by the special partner to the common stock had been actually and in good faith paid in cash, so that upon the face of the record a limited partnership was effectually

" consumated between the parties upon the terms
" and conditions specified in the articles and in said
" certificate.

" But the statute (2 R. S., 6th ed. 1154, § 8) con-
" tains a specific provision for the benefit of credi-
" tors in these words:

"'And if any false statement be made in such cer-
" tificate or affidavit all the persons interested in
" such partnership shall be liable for all the en-
" gagements thereof as general partners.' It does
" not make the persons interested general part-
" ners. This it could not do—that is to say,
" the statutes could not alter the rights and
" equities of the partners, as between them
" selves; these were fixed by the contract obliga-
" gations of the parties; nor did the statute make
" them general partners as to third persons. It did
" not intend to misdescribe their legal relation. If
" the defendants had failed to file the certificate
' and affidavit required by the statute, they would
" have become general partners, because it is
" specially provided " that no limited partnership
" shall be deemed to have been formed' until this
" requirement is complied with (2. R. S., 6 Ed.
" 1154, Sec. 8); but when this formality is complied
" with, the limited partnership is complete, with all
" the incidents belonging to such a relation, and the
" partnership thus formed continues until legally dis-
" solved; but if the certificate and affidavit prove to
" be false, the statute declares that all persons
" interested in the firm shall be liable as
" general partners for all of the firm's engagements.
" If the firm keeps its engagements the limited
" partnership and the rights and obligations of the
" parties continue as before. If it fails to keep
" its engagements the legal relation is left un-
" changed, but the persons in interest, whether as
" general or special partners, are made liable for

"such unperformed engagements, so that while not "general partners in fact nor made by statute, they "may nevertheless be holden as if they were by "creditors holding the firm's obligations. A well "defined legal distinction exists between general "partners *inter se* and persons who, without occu- "pying the legal relation, become after proof of "misconduct holden to the same liability as those "who do.

"The proofs show that the certificate and affida- "vit were false in this, that instead of contributing "his share of the capital in cash, Abendroth, the "special partner, contributed a check which was "neither paid nor credited to the firm for several "days afterwards.

"This circumstance made all of the defendants "liable for the firm's engagements (Durant *v.* "Abendroth, 69 N. Y., 148), while liable in form as "general partners: this liability, imposed as sort of "penalty, did not, as before remarked, alter the fact, "that, as between themselves, they were just what "they contracted to be, to wit: Griffith and Wun- "dram were the general partners and Abendroth "the special."

This Court has now presented to it the matter which the plaintiff in error, Abendroth, claims became *res adjudicata* by the proceedings in the United States District Court in Bankruptcy.

Point II.

The liability imposed upon Abendroth being purely a statutory one, and the highest Court of the State of New York, having placed a construction upon the statute, this court will not interfere with that construction.

Commercial Bank of Cincinnati *v.* Buckingham's Executors, 5 How., 317, 341.

See also:

Stryker *v.* Gardner, 123 U. S., 527, 536.
Bolles *v.* Brimfield, 120 U. S., 763.
Flash *v.* Conn, 109 U. S., 370, 378.
Burgess *v.* Seligman, 107 U. S. 20, 33.

In Commercial Bank of Cincinnati *v.* Buckingham's Executors, *ante*, the Court said, at p. 43:

"It is the peculiar province and privilege of the "State Courts to construe their own statutes; and "it is no part of the functions of this Court to re- "view their decisions or assume jurisdiction over "them on the pretence that their judgments have "impaired the obligation of contracts. The power "delegated to us is for the restraint of unconstitu- "tional legislation by the States, and not for the "correction of alleged errors committed by the Ju- "diciary."

Point III.

An examination of the proceedings in the Bankruptcy Court will show that the State Court recognized the jurisdiction of that Court and gave full force and effect to its adjudication.

We maintain, as a proposition founded on the long-established authority, and, in addition, on the plainest common sense and principles of justice, that, in order that a prior judgment shall conclude the party against whom it is either pleaded or given in evidence, it must be directly upon the point between the same parties and upon the same matter directly in question in the former suit, and that such a judgment is not evidence of any matter which came collaterally in question, nor of any

matter incidentally cognizable, *nor of any matter to be inferred by argument from the judgment.*

When it is said that a prior adjudication is conclusive as to any question which might have been litigated "it is meant any which might have been "litigated under the issues, unless the judgment "shows that some of such issues were not deter- "mined, in which case the judgment will not affect "such questions."

The judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. The inquiry must always be as to the point or question *actually litigated and determined.* Only upon such matters is the judgment conclusive in another action.

Dutchess of Kingston's case fully reported, 20 How. St. Trials, 355.

S. C., 2d Smith's Leading Cases. (8 ed.), 734.

Cromwell *v.* County of Sac., 94 U. S., 353.
Davis *v.* Brown, Id., 423.
Stark *v.* Stark, Id., 477.
Russell *v.* Place, Id., 606.
Boyd *v.* Alabama, Id., 445.

Lord Chief Justice De Gray, in delivering the opinion in Dutchess of Kingston's case, said:

"From the variety of cases relative to judgments "being given in evidence in civil suits, these two "deductions seem to follow as generally true: "First, that a judgment of a Court of Concurrent "Jurisdiction directly upon the point is as a plea "a bar, or as evidence conclusive between the same "parties upon the same matter, directly in ques- "tion in another Court: Secondly, that the judg- "ment of a Court of Exclusive Jurisdiction directly "upon the point is in like manner conclusive upon

"the same matter between the same parties coming "incidentally in question in another Court for a "different purpose. But neither the judgment of "a concurrent or exclusive jurisdiction is evidence "of any matter which came collaterally in question, "though within their jurisdiction, nor of any "matter incidentally cognizable, nor of any matter "to be inferred by argument from the judgment."

Cromwell *v.* County of Sac, 94 U. S., 351 :

This was an action brought on four bonds of the State of Iowa.

To defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the County in a prior action brought by one Smith, upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff, Cromwell, was at that time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

This Court held that the judgment did not estop the plaintiff holding other bonds of the same series, and other coupons attached to the same bonds as the coupons in the original action from showing in a second action against the County that he acquired such other bonds and coupons for value before maturity. Mr. Justice Field, in delivering the opinion of the Court, said at p. 352 :

"In considering the operation of this judgment "it should be borne in mind, as stated by counsel, "that there is a difference between the effect of a "judgment as a bar or estoppel against the prosecu-"tion of a second action, upon the same claim or "demand, and its effect as an estoppel in another "action between the same parties upon a different "claim or cause of action.

"In the former case the judgment, if rendered upon "the merits, constitutes an absolute bar to a subse-

"quent action. It is a finality as to the claim or "demand in controversy, concluding parties and "those in privity with them, not only as to every "matter which was offered and received to sustain "or defeat the claim or demand, but as to any "other admissible matter which might have been of- "fered for that purpose.

* * * *

"But where the second action between the same "parties is upon a different claim or demand, the "judgment in the prior action operates as an "estoppel only as to those matters in issue or "points controverted, upon the determination of "which the finding or verdict was rendered. In all "cases, therefore, where it is sought to apply the "estoppel of a judgment rendered upon one cause "of action to matters arising in a suit upon a dif- "ferent cause of action, the inquiry must always "be as to the point or question actually litigated "and determined in the original action, not what "might have been thus litigated and determined. "Only upon such matters is the judgment conclu- "sive in another action."

Davis *v.* Brown, *ante.*

This was an action against the defendants as second indorsers upon ten promissory notes, made in June 1870, by one McOmber. The defense was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were indorsed by the defendants as a mere matter of form, upon an agreement in writing of the bank that they should not be held liable on their indorsement, or be sued thereon. One of the defendants, against the objection of the plaintiff, was permitted

to testify to the transfer to and the agreement made with the Ocean National Bank concerning these notes.

To meet the defense founded upon this agreement, the plaintiff gave in evidence a accord of a judgment recorded by him against the same defendants upon two other notes of the same party, of like amount and date as those in suit, except that they became due at an earlier day, which were part of the series of notes transferred by the defendants to the bank, and indorsed by them, in settlement of their own note, as already mentioned, and were included in the agreement as part of the same transaction.

Omitting the questions of the competency and admissibility of the evidence in regard to the alleged agreement Mr. Justice Field said in delivering the opinion of the Court at p. 427: "The next question "for determination relates to the operation of the "judgment recovered by the plaintiff against the de- "fendants, as an estoppel against their setting up "the defense founded upon the agreement. The "action in which that judgment was recovered was "brought in the same Court as the present action, "against the defendants as second endorsers upon "two notes, which were part of the series of McOm- "ber notes, transferred to the bank of the defend- "ants in settlement of their own note; and their "endorsement was embraced in its agreement. * * "* * The agreement of the bank not to hold "them liable as endorsers was not pleaded nor re- "lied upon; yet it is contended by counsel that in- "asmuch as it might have been thus pleaded and "relied upon, therefore the judgment is an estoppel "against the setting up of that agreement as a de- "fence in a subsequent action between the same "parties upon other notes, equally as if its validity "and efficacy had been litigated and determined."

"In taking this position, counsel have con-

"founded the operation of a judgment upon the "demand involved in the action, in which the "judgment was rendered, with its operation as "an estoppel in another action between the par- "ties upon a different demand. So far as the "demand involved in the action is concerned, the "judgment has closed all controversy; its validity "is no longer open to contestation, whatever "might have been said or proved at the trial for "or against it. The judgment is not only con- "clusive as to what was actually determined re- "specting such demand, but as to every matter "which might have been brought forward and "determined respecting it; and that is all that "the language means which is quoted by counsel "from opinions in adjudged cases, in seeming "consonance with his position.

"When a judgment is offered in evidence in a sub- "sequent action between the same parties upon a "different demand, it operates as an estoppel only "upon the matter actually at issue and determined "in the original action; and such matters when not "disclosed by the pleadings must be shown by "extrinsic evidence."

When and where and between whom in the bankruptcy proceeding was the pretended adjudication ever made?

It was never alleged by any one in the bankruptcy proceedings that Abendroth was liable as a general partner, or otherwise, for the debts of Griffith & Wundram.

No proof was ever taken on that fact one way or the other, and the question was not litigated, passed upon, suggested or even thought of.

The Court will search in vain through the bankruptcy records for the limited partnership papers of Griffith & Wundram, and the proof of the false af-

fidavit and certificate in evidence in the cases in the State Court, including the present case.

The identical plea and proofs in support thereof interposed in this case have, in another case, brought by a creditor to enforce Abendroth's statutory liability, been examined and passed upon by the NewYork Court of Appeals in the case of Durant, Jr., *v.* Abendroth, 97 N. Y., 132, 139, where the Court unanimously held as follows:

"This adjudication is claimed, on the part of "the respondent, to be a conclusive adjudication, "binding upon all the creditors of the firm, to the "effect that Griffith and Wundram were the only "members of the firm of Griffith & Wundram, and "consequently a bar to any claim of the assignors "of the plaintiff that Abendroth was liable as a "member of said firm. The contention is that "the Bankrupt Act requires that all the mem-"bers of a copartnership be joined or pro-"ceeded against, to have the copartner-"ship declared bankrupt, and that consequently, "in adjudging the firm bankrupt, the Court must "necessarily have adjudged that all the members of "the firm were named in the petition.

"Assuming for the purposes of the argument the "soundness of this position, the difficulty remains "that a judgment operates *in personam* only upon "the parties appearing before the Court or brought "before it by proper process, and when this adjud-"ication was made it was wholly *ex parte* except as "to Griffith, who was the only party cited. So far "as the estate of the petitioning bankrupt is con-"cerned, the proceeding is in the nature of a pro-"ceeding *in rem*, and when the *res* is brought "within the jurisdiction of the Court, its adjudica-"tion is binding upon the interests of every person "whomsoever in that *res*.

"All persons interested therein must follow it

" and assert their rights, or be debarred. But that " is the extent to which the judgment binds those " who are not personally brought before the Court. " If a vessel should be libeled and brought into " Court and the libel should name only two persons " as the owners thereof, a decree in that cause ad- " judging that they were sole owners would bar a " creditor, for instance, claiming a lien thereon, " through a third part owner, from asserting such " lien as against the decree, though he were not a " party to the cause and even though he had no " knowledge of its pendency; to preserve his lien he " must intervene and assert it. But the decree " would not bar him in an action *in personam* to re- " cover his debt, from averring that the third person " not named in the libel, was also a part owner, or " from recovering against him as such part owner. "When the decree adjudging Griffith and Wundram " to be bankrupts was made neither Abendroth nor " the assignors of the plaintiff were parties to the " proceedings. It was between Griffith and Wund- " ram alone, and, even if the bankruptcy proceed- " ings are treated as proceedings *in rem*, the decree " was not conclusive as to any fact, in a subsequent " personal controversy between Abendroth and the " plaintiff or his assignors.

It is not contended that this court is in any way concluded by the decision of the N. Y. Court of Appeals in the *res adjudicata* defence, but it is cited as a precedent entitled to full consideration especially in view of the fact that the opinion was written by one of the ablest Judges who ever sat at that court and the decision was unanimous.

The City Court in the case at bar received the records of the proceedings in bankruptcy in evidence and gave them full force and effect, but held that they did not show that there had been a prior adjudication as contended for by Abendroth.

The Court said (Orig. 109): "The general partners, as a firm, became bankrupt, and on the petition of Wundram it was formally adjudicated bankrupt on the 30th day of November, 1872, and on the 20th day of December following Abendroth was chosen assignee of the firm's estate; it was a proceeding between Griffith & Wundram, the general partners, on the one hand, and the firm's creditors on the other, and it was to this extent only that the Bankruptcy Court obtained jurisdiction over the subject matter and parties. Abendroth was not a party except as creditor. No one pretended or alleged that he, (Abendroth) was bankrupt, or that the firm, if Abendroth had been included as general partner, would have been bankrupt, and the Bankruptcy Court obtained jurisdiction over Abendroth as a creditor only, and could deal with him in no other right or capacity. The adjudication and what followed affected Griffith & Wundram as bankrupts, on the one hand, and Abendroth and the other persons mentioned in the schedules as creditors on the other. The Bankruptcy Court did not and could not have adjudicated the question whether Abendroth had incurred the liability imposed by the Statute before cited. That question was not before the Bankruptcy Court, and did not belong there for adjudication.

"The determination of the question of the bankruptcy of Griffith & Wundram, and the administration of their estate, did not directly or indirectly involve the question to be determined here, *i. e.*, whether Abendroth, a creditor in the bankruptcy proceedings, was liable under the statute to the plaintiffs, who were also creditors there for the debt owing by the bankrupt firm. Bankruptcy proceedings were not designed to settle disputed claims which one creditor of a bankrupt firm may

" have against another creditor of the same firm,
" for the jurisdiction of the Bankruptcy Court is
" limited to the determination of the claims which
" creditors present against the bankrupt estate."

" The plaintiffs herein never proved their claim
" and never accepted any dividend from the assign-
" ed estate, and they have in no way, directly or
" indirectly, by influence or otherwise, done any
" act or thing which can be construed into a waiver
" of their right to enforce the statutory liability of
" Abendroth."

" The record in the Bankruptcy Court was truth-
" ful in point of fact, and this is all that it implies.
" The parties were correctly described—that is to
" say, in speaking of them in the proceedings sub-
" sequent to the adjudication 'Griffith and Wun-
" dram' were called the 'general partners' and
" 'Abendroth' the special. There was no impro-
" priety in applying these terms to the defendants,
" nor does their use add any legal force to the con-
" tention that the plaintiffs' demand here was ad-
" judicated there. If Griffith & Wundram had
" brought an action as a firm, Abendroth could not
" have been joined as a plaintiff (Schulten *v.* Lord,
" 4 E. D. Smith, 206; 2 R. S. 6 Ed., p. 1156, § 14).
" He was certainly not a necessary party, at all
" events. Upon the entire case I hold and decide
" that the bankruptcy proceedings are not a bar to
" this action; that the issue determined here was
" not and could not have been adjudicated there,
" and that the bankruptcy proceedings have no
" relevancy to the questions introduced in the
" present litigation."

Point IV.

The defendant relies on what is called the McDonald proceeding (Original, 74, *et seq*).

This was a petition by one firm of creditors, McDonald & Co., for the re-examination of certain claims proved against the bankrupts' estate and bought by and assigned to Abendroth, as McDonald & Co. claimed, in fraud of their rights.

This collateral and incidental proceeding went upon the theory that Abendroth before the bankruptcy proceedings (Original, 74), had bought from certain creditors their claims (Original, 75), and that thereafter he procured those creditors to prove as their claims what were really his, and thus enabled him in their names to vote upon these claims and so secure his election as assignee (Original, 76), although, as the petition said, "notwithstanding the fact that said Abendroth was a special partner in said bankrupt firm" and McDonald & Co. "asked that these claims should be expunged, because they had been proved in violation of the Bankruptcy Act (Original, 76).

All this was in 1873 (Original 74) and in a proceeding only between McDonald & Co., Abendroth and the creditors whose claims he had purchased (Original, 95) and the one in suit was not among them.

The proceeding was not on notice to any one but Abendroth and the creditors whose claims were attached (Original, 76). Even Griffith and Wundram had no notice.

Van Dolsen & Arnott, defendants in error, never had the slightest notice of this proceeding, or even heard of it and were not parties to it in fact or constructively. The Register to whom the hearing of

the petition was referred (Original, 76) in his opinion two questions arose (Original, 78), namely:

"*First.*—Is the account exhibited by the assignee "a just and true account of all his receipts and pay- "ments?

"*Second.*—It appearing from the account exhib- "ited by the assignee that there is money in the "hands of the assignee distributable among the "creditors of the bankrupts, What are the rights "of parties interested in such distribution?" (Orig. 78)

It must be born in mind that as the record distinctly shows, the Register merely reported his *opinion* (Original, 78) to the Court.

When this appears on the face of the paper, it is unnecessary for us to more than call attention to the fact that the Register was absolutely without power to *decide* anything, and could only report his opinion upon which the District Judge would make such an order as the proofs seemed to justify (Original, 76.)

In the course of this "opinion" (in which Justice Blatchford, then District Judge, took particular pains not to concur (Original, 92,106), the Register says (Original, 78): "It appears by the evidence "taken at this second general meeting of the cred- "itors of the bankrupts that John Griffith "and George W. Wundram, the bankrupts "in this bankruptcy, were the general part- "ners of the limited partnership of Griffith "& Wundram, of which William P. Aben- "droth, the assignee in bankruptcy, in this bank- "ruptcy was the special partner.

And it is upon this that the defendant predicates a claim of a prior adjudication. This was before the question of Abendroth's statutory lia-

bility had been settled by the New York Court of Appeals in Durant *v.* Abendroth, *ante.*

And in this proceeding, so far from there being a contest over this question, or an issue and decision upon it, the moving creditors, McDonald & Co., claimed (Original, 76) that Abendroth was a special partner, and for that reason, among others, he should not be permitted to take a dividend out of the firm's estate (Original, 91), because of the prohibition of 1 N. Y. R. S. (Edmond's Ed.), p. 720, sec. 23, which is that: "In case of the insolvency "or bankruptcy of the partnership, no special "partner shall, except for claims con- "tracted pursuant to section seventeen, under "any circumstances be allowed to claim as a creditor "until the claims of all the other creditors of the "partnership shall be satisfied."

The question of Abendroth's liability for the debts of the firm was not mooted, and if it had been the actual and only question before the register, the defendants in error would not have been bound by this proceeding, of which no notice was given to either of them, nor would their claim herein have been adjudged by a mere opinion of a register. The only adjudication made in this particular proceeding, and as insisted, defendants in error are not bound by that, is the order of Judge Blatchford (Original, 93), entered October 13, 1875.

While, as already stated, we do not contend that this Court is obliged to follow the State Court on the question of the effect to be given to the McDonald petition as a prior adjudication, we submit it as a precedent, and upon this very defence interposed in another action brought against Abendroth by another creditor to enforce the same statutory liability, that Court said:

"The respondent, however, relies, in addition to

" the decree upon subsequent steps in the bank-
" ruptcy proceedings.

" Joseph McDonald & Co., creditors of the bank-
" rupts, in August, 1873, presented a petition to
" the register in bankruptcy, setting forth that on
" the 21st of November, 1872 (two days before the
" filing of the petition in bankruptcy), certain other
" named creditors had agreed to sell their claims to
" Abendroth at twenty-five cents on the dollar, and
" had afterwards proved said debts in bankruptcy,
" and that such debts so proved had been assigned
" to Abendroth, and praying that said claims be
" disallowed, and the proofs thereof expunged on
" various grounds, one of which was that Abendroth
" was a special partner in the bankrupt firm.
" The Statute provides (1 R. S., 767, Sec. 23):
" that in case of the insolvency or bankruptcy of
" the partnership, no special partner shall (except
" in certain specially excepted cases), under any
" circumstances, be allowed to claim as a creditor
" until the claims of all the other creditors of the
" partnership shall be satisfied. The Register over-
" ruled this point, holding that, in respect to these
" assigned claims, Abendroth stood in the shoes of
" his assignors, and was a creditor as their represen-
" tative and not otherwise, which ruling is in accord
" with the decision of this Court in Hayes *v.* Heyer
" (35 N. Y., 326 330). No issue was made as to
" Abendroth holding any other relation to the firm
" than that of special partner, for the petition of the
" contesting creditors alleged that he was
" such special partner. But the respondent
" now claims that as McDonald & Co. might have
" claimed that he was a general partner, the order
" sustaining the decision of the register is an adju-
" dication that he was only a special partner, not
" liable as a general partner. Even if that effect
" could be given to the adjudication it clearly was

" not binding upon the plaintiff's assignors outside " of the bankruptcy proceedings. They were not " parties to the application of McDonald & Co. and " had not even notice of it, for the order was made " on notice only to the creditors, proofs of whose " debts were sought to be expunged, and the plain- " tiff's assignors were not among these. It was *res* " *inter alios acta.*"

In addition to the above, all that we have argued before as to the limitation of judgments to the matter actually decided applies equally well. The register did not consider the question of Abendroth's statutory liability. That matter was not directly or incidentally before him and was not decided by the order made by Judge Blatchford on the report of the register.

Point V.

The plaintiff in error relies on some decisions of the State Court and in the District Court of the United States, for the Southern District of New York, In Bankruptcy.

They are as follows:

(*a.*) Van Dolsen *v.* Abendroth, 43 N. Y. Super. Ct., 470.

In Re., Griffith, 18 N. B. R., 510.

In the case of Van Dolsen *v.* Abendroth, in the New York Superior Court, plaintiff's (defendants in error in this Court), *demurrer* to the bankruptcy defense was sustained, and the defendant appealed to the General Term. Of course, being on a demurrer, it proceeded upon the assumption of the truth of the allegation that there *had been* an adjudication as to the special partnership

which was pleaded just as it appears in the record herein (Record p. 10). Taking the allegation as proof, which it was obliged to do, the Court held:

"By this *adjudication* that the defendant Abendroth *was held to be* a special partner, and hence "in the position which the State Law declares of "not being liable for the debts of the partnership "beyond the sum contributed by him as capital, "the *adjudication* that the firm of Griffith & "Wundram *was a limited partnership*, limited "the plaintiffs and other creditors who were the "parties to the proceedings to a remedy against the "sum contributed as capital to the firm as far as "the defendant Abendroth is concerned."

There were no proofs before the Court in that case; it never saw the alleged adjudication; had the real adjudication been shown, no such decision would have been made, for it would then have appeared that it did not in any way include the adjudication which the pleading demurred to admitted to have been duly made. This decision was made in 1877. In 1884 the Court of Appeals of the State of New York, in the case of Durant, Jr., *v.* Abendroth, 97 N. Y., 132, by an unanimous decision as shown *ante* declared the insufficiency of this defense and consequently the decision of Van Dolsen *v.* Abendroth is without any force as an authority.

In Re Griffith arose in a proceeding taken in the U. S. District Court for the Southern District of New York, in bankruptcy, in the bankruptcy proceedings of Griffith *v.* Wundram, and at the instance of Van Dolsen *v.* Arnott, defendants in error herein. An appeal was taken from Judge Choate's decision to Judge Blatchford sitting in the United States Circuit Court on review of bankruptcy matters.

In the first place, this proceeding was only a *mo-*

tion made in the bankruptcy proceedings. Van Dolsen and Arnott did not prove their claim in bankruptcy, and Judge Choate regarded that as an answer to their proceedings, because a Bankruptcy Court regards creditors who do not prove their claims as "mere strangers" who have not "any standing" in the particular bankruptcy case, to make an application to the Court. Judge Choate said, "Nor do I see how a mere stranger to the "proceeding, if these creditors claim to be such, "can have any standing *in this proceeding itself* "to have such determination set aside." But upon the question of the jurisdiction of the Bankruptcy Court in the particular case of Griffith & Wundram Judge Choate lays down a proposition of law which, whether correct or not, does not cover the case.

He said: "Assuming that the Court has jurisdic- "tion only over all the copartners and not over "some of them less than all, still the Court "had power and authority; in other "words, had jurisdiction to entertain and deter- "mine the question what persons in fact did con- "stitute the firm. The fact that Griffith & Wun- "drum alone did constitute the firm was alleged in "the petition, and was necessarily found and de- "termined by the Court before it could or did de- "termine that the adjudication should be made. "This was the determination by the Court in the "due and proper exercise of its jurisdiction of a "fact. Now although the fact may be called a jur- "isdictional fact, nevertheless the rule of law is "that the determination by the Court of a fact, "though a jurisdictional fact, is binding on all the "parties to a suit, and on all those who had any "opportunity to be heard and to contest that "fact."

But Judge Choate's proposition is based upon *inferences* derived from the adjudication of bank-

ruptcy, and, as we have shown, the authorities are unanimous in holding that a prior adjudication is not to be upheld by inference or construction, but that it must plainly and clearly appear by the record as a matter in controversy and determined. Does it appear by the petition referred to by Judge Choate, and which defendants put into this case, that the Bankruptcy Court adjudicated the question whether Abendroth had incurred the liability imposed by a statute of the State of New York?

Judge Choate says that the Court *necessarily* passed on the question as to who constituted the firm. That may be so. It is certainly only a matter of inference, for he does not point out where he finds it in the petition or adjudication, only the Court necessarily did it. But that is not conclusive of the question involved in this case. Judge McAdam, in delivering the opinion in the State Court, says: "This liability imposed as "a sort of penalty did not, as before "remarked, alter the fact that as between "themselves they were just what they contracted "to be, to wit: 'Griffith & Wundram, were the "general partners and Abendroth the special "(Print p. 59) * * * * "The record "in the bankruptcy court was truthful in point of "fact and that is all that it implies. The parties "were correctly described, that is to say, in speaking of them in the proceedings subsequent to the "adjudication, 'Griffith and Wundram were "called the general partners' and Abendroth the "special. There was no impropriety in applying "these terms to the defendants, nor does their use "add any legal force to the contention that the "plaintiff's demand here was adjudicated there." (Print p. 60).

We next have Judge Choate's opinion on another motion in the same case (unreported), but this time

made by John Griffith and George W. Wundram to amend the original petition so as to make Abendroth a party thereto. This application was several years later than the adjudication, and Judge Choate decided it was a purely discretionary matter, and he refused to exercise his discretion in favor of the petitioners, *they* having *always* known the facts upon which the question of the liability of Abendroth turned.

(*b.*) The counsel for the plaintiffs in error contends that it was determined in the case of Roderigas *v.* East River Savings Inst., 63 N. Y., 460, that judgments *in rem* do have a personal effect and that "a live man was denied his estate because "an administrator had been appointed thereon, "the Court having judicially and unimpeachably "determined he was dead."

Judge Miller, in delivering the opinion of the Court in that case, says at p. 170:

"The question to be determined in this case is "whether payment to an administrator duly ap- "pointed by a Surrogate as the law directs, of a per- "son supposed to be dead, and who, it subsequent- "ly appears, was living at the time when letters "were granted, is valid and conclusive against an "administrator actually appointed after the de- "cease of the intestate."

The Court decided this question in the affirmative.

The case was wholly based upon the construction of the Statutes of the State of New York, regulating the jurisdiction and proceedings of Surrogate's Courts, and does not establish the principle contended for by the counsel for the plaintiffs in error, and is not in any way an authority for the position taken by him.

Counsel for the plaintiffs in error also cites *in re*

Wallace, Deady, 433, which we submit, does not at all affect the question involved in this case.

That was a petition by certain of the creditors of a voluntary bankrupt for an injunction to restrain other creditors from selling the property of the bankrupt on execution. A demurrer was interposed to the petition which was overruled.

Judge Deady, says, at p. 434 of that case:

"The adjudication in this Court by which Wal-
"lace was declared a bankrupt, determined his legal
"status *in that respect*, and so far is binding upon
"all the world. * * * * * * The decree is
"in the nature of a proceeding in *rem* before a Court
"having jurisdiction of the subject matter and is no-
"tice and evidence to third persons, not actually par-
"ties thereto that Wallace *had committed an act of*
"*bankruptcy for which he had been duly decreed*
"*a bankrupt.*"

(The italics are our own).

Chief Judge McAdam, in the course of his opinion in the case at bar, says: "The general partners
"as a firm became bankrupt, and on the petition
"of Wundram it was formerly adjudicated bank-
"rupt on the 30th day of November, 1872" (Original, 109; Print, p. 59).

That Griffith & Wundram had committed an act of bankruptcy for which they had been duly decreed bankrupts is not at all controverted.

Counsel for the plaintiffs in error also cites:

Re Oregon Bulletin Co., 14 N. B. R., 394.
Re Comstock, 33 Sawyer, 128; S. C., 10 N. B. R., 451.
Re Raffauf, 6 Biss., 150.
Re Archenbrown, 11 B. R., 149.

In Re Oregon Bulletin Co., Judge Deady says, at p. 396:

"A proceeding by a creditor to have a debtor adjudged a bankrupt is a *case* within the ordinary meaning of the term. It is a contest carried on before a Court, between parties plaintiff and defendant, according to a form prescribed by law, for the purpose of obtaining the judgment of the Court upon a matter in controversy between them. * * * * * This action or case is commenced by the filing of the petition, *and terminates with the judgment of the Court that the debtor is or is not bankrupt.*"

(The *italics* are our own.)

In Re Comstock the question directly involved was, whether an amendment of Section 39 of the Bankrupt Act, by the Act of June 22, 1874, making it necessary for one-fourth of the creditors in number, and one-third in value, to join in the petition to have their debts adjudged a bankrupt, in cases commenced since December 1st, 1873, would apply to cases determined before its passage. The Court decided this question in the negative.

Judge Deady says in the course of his opinion, at p. 452: "A petition to have a debtor adjudged a bankrupt, is to all intents and purposes an action or suit. *The direct and immediate object of the proceeding is to obtain the judgment of the Court that the debtor is a bankrupt.*"

In Re Raffauf the question decided was, that the amendment of June 22, 1874, to Section 39 of the Bankrupt Act, did not apply to cases in which an adjudication had been entered before the passage of the act.

The cases of Re Oregon Bulletin Co. and Re Comstock expressly declare in the clearest possible terms that the direct and immediate object of

the proceedings in bankruptcy is to determine whether or not the debtor is a bankrupt.

Both of these cases are direct authorities in support of the position taken by Chief Judge McAdam in the State Court in the case at bar that: "The "Bankruptcy Court did not and could not have ad- "judicated the question whether Abendroth had "incurred the liability imposed by the statute be- "fore cited; that question was not before the Bank- "ruptcy Court, and did not belong there for ad- "judication." (Orig. 110; print, 59).

In re Archenbrown, also cited by plaintiffs in error, was a case where the *bankrupt petitioned*, under Section 21, to restrain a creditor (one Levey) from prosecuting an action in the State Court until the question of his discharge then pending in the Bankruptcy Court had been determined. On the return of an order to show cause it appeared that the name of the creditor had been omitted from the list of creditors furnished to the Marshal by the bankrupt; that he received no notice of the bankruptcy proceedings; that he had not proved his debt, or received any dividend in the bankruptcy proceedings. Judge Longyear, in granting the petition, said, at p. 152: "Provision is made, however, "by Section 29, for defeating the granting of a dis- "charge, and by Section 34 for the annulling of the "same when once granted, on the grounds "here alleged, under certain restrictions and "limitations; and creditors like Mr. Levey, who "have been omitted from the schedule, must avail "themselves of the provisions of those sections if "they would avoid their debts being barred by the "granting of a discharge."

It is, therefore, self-apparent that the detached sentence from this case quoted in the brief of counsel for plaintiffs in error is a mere *dicta*, and its

decision was not necessary to the determination of the case.

The point actually decided in the case was the right of the bankrupt to the stay of proceedings given by section 21 of the Bankrupt Act.

Point VI.

Counsel for the plaintiff in error contends, that Sections 5105 and 5106 of the Revised Statutes of the United States, constitute a plea in abatement of any "action subsequently brought in the State "Court against the debtors for the recovery of a "personal judgment upon a chose in action made "by the partnership."

§ Sec. 5105 is as follows: "No creditor proving "his debt or claim shall be allowed to maintain any "suit at law or in equity therefor against the bank- "rupt, but shall be deemed to have waived all right "of action against him; and all proceedings al- "ready commenced or unsatisfied judgments al- "ready obtained thereon against the bankrupt shall "be deemed to be discharged and surrendered "thereby."

To show that Section 5105 just quoted is wholly inapplicable to the case at bar, we again call the attention of the Court to the fact that Van Dolsen and Arnott, defendants in error, *never did prove in bankruptcy their debt or claim.*

The certificate of the Register as to debts proved forms a part of the record in this case (Original, 96; print, 50). In this the Register certifies "that the "following is a memorandum showing the names "of the creditors of said bankrupt who have filed "depositions for proofs of debts against the said "bankrupts" (Original, 96; print, 50); and then fol-

lows a list of some thirty creditors. *The names of Van Dolsen & Arnott, or either of them, does not appear on this list* (Print, 51), and the section in question can have no application to them.

Section 5106 also relied on by the plaintiff in error is as follows:

"No creditor whose debt is provable shall be al-
"lowed to prosecute any suit at law or in equity
"therefor against the bankrupt, until the question
"of the debtor's discharge shall have been deter-
"mined, and any such suit or proceeding shall,
"upon the application of the bankrupt, be stayed
"to await the determination of the Court in bank-
"ruptcy on the question of the discharge, provided
"there is no unreasonable delay on the part of the
"bankrupt in endeavoring to obtain his discharge
"and provided also, that if the amount due the
"creditor is in dispute, the suit, by leave of the
"court in bankruptcy, may proceed to judgment
"for the purpose of ascertaining the amount due,
"which amount may be proved in bankruptcy,
"but execution shall be stayed."

The transcript of record in the case at bar does not show that any application was ever made to the City Court of New York, or to the District Court of the United States in Bankruptcy by the bankrupt or his assignee, to stay the proceedings "to "await the determination of the Court in bank-"ruptcy on the question of the discharge."

In the case of Hill *v.* Harding, 107 U. S., 631, Section 5106 of the Revised Statutes was under consideration. Mr. Justice Gray, after quoting the section in question, says:

"*Upon the application of the bankrupt* to the
"Court, state or national, in which the suit is pend-
"ing, it is the duty of that Court to stay the pro-
"ceedings, 'to await the determination of the Court

" in bankruptcy on the question of the discharge,'
" unless there is unreasonable delay on the part of
" the bankrupt in endeavoring to obtain his dis-
" charge or unless the amount of the debt being in
" dispute, the United States Court sitting in bank-
" ruptcy gives leave to proceed to judgment for the
" purpose of ascertaining that amount. *If neither*
" *the bankrupt nor his assignee in bankruptcy*
" *applies for a stay of proceedings, the Court may*
" *of course proceed to judgment.*

" Doe *v.* Childress, 21 Wall., 642.
" Eyster *v.* Gaff, 91 U. S., 521.
" Norton *v.* Switzer, 93 U. S., 355."

(The italics are our own.)

This seems to be a complete answer to the contention of the counsel for the plaintiff in error.

Point VII.

It is respectfully submitted that the judgment, as to which the writ of error was allowed, should be affirmed with costs to the defendants in error.

Carlisle Norris Jr.

Of Counsel for Defendants in Error.

JAMES B. McKENNEY
C.J.

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 229.

WILLIAM P. ABENDROTH, PLAINTIFF IN ERROR,

vs.

ABRAHAM VAN DOLSEN *et al.*, DEFENDANTS IN ERROR.

REPLY TO DEFENDANTS' BRIEF.

WM. H. ARNOUX,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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REPLY TO DEFENDANTS' BRIEF.

I.

If it were true that no Federal question were involved in this appeal, then the Court should dismiss. The demand that this Court should affirm admits its jurisdiction.

The ground upon which the judgment was rendered against Mr. Abendroth is incorrectly stated in the opposing brief, as the pleadings will show. The defendants were sued as copartners, without any suggestion that a special partnership had been created or attempted to be created. The answer set up special matters of bankruptcy, both in bar and abatement. The judgment was rendered in plaintiff's favor; so the determination was that defendants were partners.

Consequently the court did hold, in rendering judgment for plaintiff, that Mr. Abendroth was, in fact and in law, a

general partner, or else the rule that judgment is procured *secundum allegata et probata* has been abrogated.

The counsel for defendants in error quotes liberally from the opinions of the courts to show the status of the plaintiff in error, but the opinions cannot overrule or override the the judgment.

And, in arriving at that conclusion, the court was compelled to pass upon the effect of the plea of bankruptcy, and in so doing denied to the law of Congress the effect intended in its enactment.

II.

It is not here contended that this Court will interfere with the construction which the State courts have given to the State law.

III.

The proceedings in the bankruptcy court show that the State court did not recognize the jurisdiction of that court, and did not give either full force or effect to its adjudication.

Those proceedings demonstrate that in the judgment of the bankruptcy court adjudicating that the firm of which John Griffith and George W. Wundram were partners was bankrupt, the direct, substantive, and fundamental fact was the membership of the firm, and it came neither collaterally in question nor was it matter incidentally cognizable, nor was it matter inferred by argument from the judgment. Judge Choate's opinion is a clear, concise, and conclusive statement of the law upon the subject, and it was approved and affirmed by Mr. Justice Blatchford.

Under the Constitution of the United States the Federal courts have exclusive jurisdiction of bankruptcy cases whenever a national bankrupt law is in force, and, therefore, under the law as laid down in the Duchess of Kingston's case its adjudication is conclusive.

A judgment rendered on default in favor of a physician against a patient is conclusive evidence that the plaintiff was not guilty of malpractice.

The granting of letters of administration involves an adjudication that the person upon whose estate such letters are granted is dead.

So an adjudication that a firm whose partners are named is bankrupt is an express adjudication that the firm was composed of the persons named. A suit, therefore, upon a debt provable in bankruptcy can no more be maintained against a firm composed of three members, when the bankruptcy court has adjudged that such firm was composed of two members, than could a new and independent proceeding be instituted in bankruptcy against the three as composing such firm.

We appeal to the law as laid down in the Sac County case. It is conclusive against the defendants in error, and the language quoted in their counsel's brief, at the top of page 17, fits this case like a glove.

The defendants in error by moving in the bankruptcy court admitted that it was in the power of that court to give them relief. It was possible, as Mr. Justice Field suggests, for them to have offered admissible testimony to defeat the adjudication, or to open it and have it annulled, or to have had the third party brought in, if they could have proven that the firm had three members who should have been adjudicated bankrupts instead of the two who were so adjudged, if they had made the proper effort at the proper time.

The Davis case makes the distinction still clearer. Here the State court's action was not another action upon a different demand. It was upon the very demand set forth in the schedules of Griffith and Wundram in bankruptcy, held by these parties. They were creditors for the demand in this action.

In the first action in the Davis case the agreement was not pleaded or proved. "That judgment," says Mr. Justice

Field, "was conclusive as to every matter which *might* have been brought forward and determined by it." Suppose that the creditors had had Mr. Abendroth brought into the bankruptcy court, could he have successfully defended against this action upon the ground that he was not a partner?

The opposing counsel asks, "When and where and between whom in the bankruptcy proceeding was the pretended adjudication made?" as if it were a complete refutation of Judge Choate's and Mr. Justice Blatchford's determination. We ask, When, where, and between whom was any adjudication made, according to his theory that this is a judgment *in rem*, binding only the property? But we can answer his question: It was made in the court, and at the time the adjudication was made, and it was between the bankrupts and all their creditors, who have suffered that adjudication to stand to this day in full force and effect.

That no proof was taken and the question was not litigated does not impair a judgment suffered on default, and it reflects only upon those who might have given proof and have litigated the question.

The Court would search in vain in the first Davis case for the matters alleged to defeat the second, as it will search in vain in the bankruptcy court for the matters now claimed to defeat its decree; and yet the Davis judgment was conclusive as to all involved therein and so is this.

So the two cases cited in this Court condemn the contention of the defendants in error.

The counsel makes a lengthy citation from the opinion in Durant, Jr., *vs.* Abendroth, and, we repeat, if that is good law, if it is true that the bankruptcy adjudication is exclusively *in rem* and wholly *ex parte* except as to Griffith, then a discharge is not obtained by due process of law and must be unconstitutional as a defense against creditors. Indeed, the whole argument overlooks the fact that the jurisdiction of the bankruptcy court is special and peculiar and is limited to bankrupts. If it be duly shown that the firm, by

reason of the wealth of one of its members, is not bankrupt, the Court must dismiss the proceedings; it has no jurisdiction.

If the City court held, as asserted, that the evidence did not show a prior adjudication, then it denied full force and effect to the decree of the Bankruptcy court, for both Judge Choate and Mr. Justice Blatchford held that it did, and they certainly were more competent to pass upon such a question than the City court.

When the City court said "No one pretended or alleged that he (Abendroth) was bankrupt, or that the firm, if Abendroth had been included as general partner, would have been bankrupt" it furnished the best evidence that the Bankruptcy court must have adjudged that he was not a partner. He cannot be sued solely, and if sued jointly with them he has the same defense they have.

The suggestion that "bankruptcy proceedings were not designed to settle disputed claims which one creditor of a bankrupt firm may have against another creditor of the same firm," however formidable in sound, is wholly irrelevant, unless it means to admit that this is a contention between two creditors, and if so, is fatal to the decision. If a creditor, Mr. Abendroth is not a partner; and it certainly is not true that "the jurisdiction of the bankruptcy court is limited to the determination of the claims which creditors present against the bankrupt estate."

Suppose that defendants in error have done nothing to waive their statutory right against Mr. Abendroth—that is, as against him individually—if they cannot sue his alleged copartners they cannot sue him; and if they are correctly described as the City court say they are—Griffith and Wundram, general partners, and Abendroth the special—they cannot be sued.

The authorities for this position will be found in original brief.

IV.

The McDonald petition and decision were binding upon all the creditors of Griffith & Wundram. Van Dolsen & Arnott were constructively parties thereto. This can be tested by this very case.

Van Dolsen & Arnott petitioned to have the bankruptcy proceedings dismissed. No other creditor petitioned or was heard.

Could each creditor in turn have presented a similar petition? Would the court have been bound to hear each one and pass upon it separately, as if it had been the only one? And if nineteen times the petition were denied and the twentieth time it was granted, what would have been the position of the nineteen creditors?

Or in the application subsequently made, where one creditor petitioned to have the matter opened and Mr. Abendroth made a party, which was denied, was that binding only upon the petitioner? Or if some creditor had immediately upon receiving notice of the proceeding taken proper action to establish Mr. Abendroth's alleged liability, and the court upon such contest had adjudicated that Mr. Abendroth was not a partner and was not liable for the debts of Griffith & Wundram, could every other creditor have made a similar contest or have brought an action in disregard of such adjudication?

And would such adjudication have any greater force and effect than the adjudication made?

On the contrary, judgments on default have the same force and effect in collateral proceedings that judgments rendered upon evidence after issue have.

The cases of removal of causes and applications for issues in equity cases for trial by jury by one defendant illustrate this principle.

We regret that we have not authorities to present on this

question, but authorities would avail little on such a plain proposition of law.

When, therefore, the register found as a matter of fact, *by the evidence* taken before him, that Mr. Abendroth was a special partner, the order of Mr. Justice Blatchford was an affirmance of this finding.

This has virtually just been determined by Judges Butler and McKennon in Michaelis *vs.* Roessler, where, in proceedings to punish for a contempt, the court held that a finding was fatal to a report, and refused to confirm it.

In the opinion quoted at the foot of page 27 of defendant in error's brief it is said: "Even if that effect could be given to the (McDonald) adjudication it clearly was not binding upon the plaintiff's assignors *outside* of the bankruptcy proceedings." Where can an authority be found that an adjudication can be binding upon a party *inside* of a proceeding and not *outside* of it? If binding in the proceeding it is binding everywhere and upon every person bound thereby. You cannot play fast and loose with adjudications in that manner. It is inconceivable that a great and learned judge should have fallen into such an error.

It cannot be said that the matter was not before the register, for we have none of the evidence; but this is clear, that some party proved it as a fact, and the judge approved his decision.

V.

The decisions of the courts referred to on this point which the opposing counsel criticises are sound law.

That Judge Choate did not consider Van Dolsen and Arnott strangers is evident from the fact that he did not dismiss but denied their petition. Their counsel claimed they were strangers, and the remark quoted on page 30 corroborates this. If they were strangers he says they would have no standing, and denying their motion was an admission

they were not strangers. He heard their application and decided it upon the merits.

Where Judge Choate makes a decision the counsel insists that it is based upon *inferences*, and criticises it by an incorrect summary of the law—incorrect because the authorities are unanimous that a prior decision is to be upheld by every intendment, and cannot be overthrown by inference or construction.

If, as Judge Choate says, the court *necessarily* passed on the question as to who constituted the firm, and as the counsel virtually concedes it, it is quite unnecessary to point out where he finds it.

And this is conclusive of the question here involved, Judge McAdam, of the City court, to the contrary notwithstanding.

The counsel cannot blow hot and cold on this question of partnership. Either he must stand on his pleading and judgment or admit that Mr. Abendroth is a special partner. He cannot insist that Judge Choate is right and Judge McAdam right in the judgment pronounced.

It is unnecessary to follow the brief further in review of the cases cited by us. They are submitted for the approval of this court as sound expositions of the law.

The only observation we desire to make is that the counsel very discreetly maintains perfect silence as to the case of Robertson *vs.* Smith, and the text-writers on the question therein involved, that if this is a judgment against two joint debtors, an action against three, including those two, on the same subject-matter cannot be maintained, and therefore the plea of plaintiff in error is a good plea in bar of this action.

VI.

The sections quoted were intended to state the scheme of the bankrupt law, not for the purpose of asserting that defendants in error were embraced in section 5105.

The case cited, of Hill *vs.* Harding, does not involve the

question here discussed, except incidentally. The relief that the adjudged bankrupts have is unquestionably correctly stated, and that involves the conclusion, that under any circumstances the plea here interposed is good in abatement of the action.

VII.

It follows from all these considerations that the judgment pronounced by the City court is erroneous.

Wm. H. Arnoux,
Of Counsel for Plaintiff in Error.